Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC., SEARS HOLDING CORPORATION, ESL INVESTMENTS INC., WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE DEFENDANTS WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, JAMES MCBURNEY and DOUGLAS CAMPBELL

(MOTION FOR CERTIFICATION RETURNABLE APRIL 17-18, 2019)

April 12, 2019

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza, 40 King Street West
Toronto, ON M5H 3C2

William J. Burden LSO #: 15550F
Tel: 416.869.5963
Fax: 416.640.3019
bburden@casselsbrock.com

Wendy Berman LSO #: 32748J
Tel: 416.860.2926
Fax: 416.640.3107
wberman@casselsbrock.com

John N. Birch LSO #: 38968U
Tel: 416.860.5225
Fax: 416.640.3057
jbirch@casselsbrock.com

Lawyers for the Defendants William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, James McBurney and Douglas Campbell

TO: **SERVICE LIST**

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2014 ONSC 5190
Ontario Superior Court of Justice

1291079 Ontario Ltd. v. Sears Canada Inc.

2014 CarswellOnt 12200, 2014 ONSC 5190, 245 A.C.W.S. (3d) 523

1291079 Ontario Limited, Plaintiff and Sears Canada Inc. and Sears, Roebuck and Co., Defendants

Gray J.

Heard: June 11, 2014
Judgment: September 8, 2014
Docket: 3769/13

Counsel: David Sterns, Andy Seretis, for Plaintiff
Peter F.C. Howard, Samaneh Hosseini, for Defendants

***Gray J.*:**

1 The plaintiff was a "Sears Hometown Store" operator. Sears is a well-known, large retailer.

2 This case has to do with the relationship between operators of Hometown Stores and Sears. In substance, it is alleged that Sears has taken inappropriate and undue advantage of its position, to the unlawful disadvantage of the store operators.

3 In this motion to certify an action as a class proceeding, the plaintiff seeks to represent a class of persons who had, or have, Hometown Store contracts with Sears. It is said that the contractual arrangements constitute the members of the class as "franchisees" and the defendants as "franchisors", thus making applicable the provisions of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3. If so, the provisions of that *Act* bring into play certain disclosure obligations that have not been fulfilled, and a number of substantive provisions that give rise to statutory causes of action and potential damages. In the alternative, it is alleged that the defendants have breached their common-law obligation of exercising discretion under the agreements in good faith, thus giving rise to damages.

4 For the reasons that follow, the motion is granted and this action is certified as a class proceeding.

Background

5 As I will discuss more fully later, the plaintiff is required to satisfy the requisites of section 5(1) of the *Class Proceedings Act*, S.O. 1992 c.6, as amended. With respect to the issue of whether a cause of action is disclosed, only the pleadings are to be examined. Regarding the other criteria, it is incumbent on the plaintiff to show that there is some basis in fact to support the conclusion that each criterion has been met.

6 With these requirements in mind, I will discuss the basis of the claim and the defences as outlined in the pleadings, and some of the evidence that is relevant to the other criteria.

7 The plaintiff alleges that the members of the class comprise a network of approximately 260 "Sears Hometown Stores" pursuant to a standard Dealer Agreement. The plaintiff alleges that the Dealer Agreement is a franchise agreement within the meaning of the *Arthur Wishart Act*.

8 The plaintiff alleges that Sears uses its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieves unattainable revenues. The plaintiff alleges that Sears is aware that the Hometown Store program is not economically viable for the dealers.

9 The plaintiff alleges that the Hometown Store program is profitable for Sears. It is alleged that Sears realizes high profit margins on sales made through the Hometown Stores while downloading high costs onto the dealers. While Sears maintains unilateral, discretionary power under the agreement to adjust the dealers' financial compensation, Sears has ignored repeated pleas to exercise its discretion to increase compensation to a sustainable level.

10 The plaintiff alleges that Sears conceals the economic reality about the Hometown Store program from prospective dealers. It disregards franchise disclosure laws designed, among other things, to provide full disclosure of all material facts related to the franchise system. Instead of disclosing the truth about the economics of the system, it provides a common information package to prospective dealers which touts the system as "brilliant", "better than a franchise", and "a smart business model".

11 The plaintiff alleges that once the Dealer Agreement is signed, Sears exploits the dealer by maintaining a compensation structure that does not allow the dealer to make a living wage, let alone a return on its investment and efforts; Sears poaches sales in the dealers' Market Areas by selling goods directly to customers; Sears charges an unauthorized "handling fee" on goods purchased online or by telephone and shipped to the dealers' stores; and Sears has introduced new programs that actually claw back for many dealers what little economic benefits the program delivers to the dealers.

12 The plaintiff alleges that these actions of Sears are contrary to its contractual duty of good faith and statutory duty of fair dealing.

13 The plaintiff alleges that on goods sold through a Hometown Store, Sears realizes a gross margin of approximately 36 per cent. It is alleged that out of that amount, Sears pays the dealer approximately 10 per cent. Out of that commission, the dealer must pay rent, its employees, utilities and all other expenses. It is alleged that the vast majority of dealers barely earn enough commissions to cover their expenses and pay minimum wage to the principals.

14 The plaintiff alleges that under the Dealer Agreement, the commissions can be changed by Sears in its sole discretion on 90 days notice. The plaintiff alleges that Sears has a duty of good faith and a statutory duty of fair dealing under the *Arthur Wishart Act* to exercise its discretion in a manner which is fair and commercially reasonable. Instead, it is alleged that Sears has perpetuated a predatory system of under-compensation. The plaintiff alleges that the commissions need to be increased to at least 15 per cent in order for the network to be viable. Instead, Sears has lowered commission rates and unlawfully competed within the dealers' Market Areas by shipping directly to customers, and offered lowered prices through direct selling channels while prohibiting dealers from matching prices.

15 Specifically, the plaintiff alleges that in August 2012, Sears reduced the average retail commission rates paid to dealers.

16 The plaintiff alleges that the Dealer Agreement does not permit Sears to compete in the dealers' Market Areas using direct shipping through direct channels. Despite this, it is alleged that Sears actively competes by selling through direct channels and shipping directly to customers in the dealers' Market Areas. In the event that the Dealer Agreement does not specifically prohibit Sears from acting in this way, it is alleged that Sears has failed to take the dealers' reasonable commercial interests into account or comply with the duties of good faith and fair dealing.

17 The plaintiff alleges that Sears charges a $3.95 flat handling fee for customers that purchase items through a direct channel and choose to ship to a Hometown Store for pick up. This fee is kept by Sears and not by the dealer. The plaintiff alleges that the imposition of the fee is a breach of the Dealer Agreement or alternatively it constitutes a breach of the duties of good faith and fair dealing.

18 The plaintiff alleges that Sears has changed the method of sharing advertising costs with the dealer, the result of which is that dealers are now paying more for local advertising. It is alleged that these changes are a breach of the Dealer Agreement, or alternatively they constitute a breach of the duties of good faith and/or fair dealing.

19 The plaintiff alleges that Sears is a franchisor under the *Arthur Wishart Act*, and each dealer is a franchisee. Thus, it is alleged that Sears owes the class members a duty of fair dealing in the performance and enforcement of the Dealer Agreement under section 3 of *Act*. It is alleged that the actions of Sears constitute violations of these duties.

20 The plaintiff alleges that pursuant to the *Arthur Wishart Act*, Sears was required to deliver to prospective dealers a statutorily prescribed disclosure document. It is alleged that Sears did not do so. Had it done so, Sears would have to had to disclose materials facts, including:

a) over 70 per cent of dealers are not profitable;

b) many dealers exhaust their resources and cease operating within a few years;

c) revenues of Hometown Stores have been steadily declining;

d) Sears competes directly by selling into dealers' Market Areas through direct channels;

e) Sears charges an improper handling fee of $3.95 for items purchased through a direct channel for shipment to a Hometown Store;

f) Sears does not share the cost of local advertising undertaken by the dealer.

21 The plaintiff claims that each dealer is entitled to damages pursuant to sections 3 and 7 of *Arthur Wishart Act*.

22 In the event that the *Arthur Wishart Act* does not apply, the plaintiff claims that the members of the class are entitled to damages for breach of contract, including breach of the duty of good faith; and disgorgement of profits unreasonably retained as a result of Sears' unjust enrichment. It is pleaded that Sears has retained those profits unjustly, to the detriment of dealers and without juristic reason.

23 The plaintiff claims that Sears has violated the Dealer Agreements by failing to account for commissions, and now claims a complete accounting of all commissions since the inception of the Dealer Agreements, and judgment for any shortfall arising therefrom.

24 In the statement of defence, it is asserted that Sears Canada Inc. is a leading retailer of general merchandise in Canada. It is asserted that Sears, Roebuck and Co. does not carry on business in Canada. It is asserted that Sears, Roebuck is only a party to the Dealer Agreements because it is the owner of several Sears trademarks. Otherwise, Sears, Roebuck has no other duties or obligations under the Dealer Agreements.

25 The defendants assert that the *Arthur Wishart Act* does not apply to the Sears Hometown Stores. It is asserted that the operators of the Hometown Stores are not franchisees within the meaning of the *Act*.

26 The defendants deny that dealer commissions have been reduced. In fact, it is asserted that the August, 2012 changes to the compensation structure resulted in an increase to the average commission. It is asserted that direct sales have been part of Sears' business for many years, and there is nothing in the Dealer Agreement that precludes Sears from engaging in this practice. It is asserted that Sears provides a 4.5 per cent commission to dealers on catalogue and internet sales shipped to their stores. It is asserted that the changes to advertising subsidies led to the reduction of advertising expense for the dealers.

27 The defendants deny that any amendments to the dealer compensation structure and advertising subsidies were detrimental to the dealers, or amounted to a breach of contract, breach of a duty of good faith (or breach of the statutory duty of fair dealing in the event that the *Arthur Wishart Act* applies, which is denied) or unjust enrichment.

Section 5(1) of the Class Proceedings Act

28 As noted earlier, the plaintiff must satisfy the requisites of section 5(1) of the *Class Proceedings Act*. That subsection provides as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interest of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

29 I will discuss each requirement of section 5(1) in turn.

i. Do the pleadings disclose a cause of action?

30 Under this requirement, all that is to be examined are the pleadings. No evidence is to be considered. With respect to the other requirements of section 5(1), the plaintiff must show that there is some basis in fact for each of those requirements.

31 It is not in dispute that the test under section 5(1)(a) of the *Class Proceedings Act* is the same as the test under Rule 21.01(1)(b), as to whether a pleading discloses a reasonable cause of action: that is, whether it is "plain and obvious" that the pleading does not disclose a reasonable cause of action: see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.). In assessing the claims made in the pleading, it is to be read generously, with allowances for deficiencies: see *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145 (Ont. S.C.J.), at para. 26.

32 The assertion that the *Arthur Wishart Act* applies to the relationship between Sears and the plaintiff is clearly a proper cause of action. The defendants do not contend otherwise, and indeed they concede that this allegation is properly a common issue. If the *Act* applies, the claims for damages under sections 3 and 7 of the *Act* are clearly appropriate as well.

33 The defendants also do not deny that the plaintiff has pleaded valid causes of action based on the implied duty of good faith, and unjust enrichment.

34 I should note that the plaintiff has asserted a cause of action based on negligent misrepresentation, but counsel advised me at the hearing of the motion that that cause of action will be abandoned and the statement of claim amended accordingly. I also note that it is agreed that if the *Arthur Wishart Act* applies, it will be applicable to all operators of stores, both within and outside Ontario.

35 In the final analysis, the plaintiff has pleaded valid causes of action and accordingly section 5(1)(a) has been satisfied.

36 I note that while Sears alleges that there is no cause of action against Sears, Roebuck, that is best determined on a motion for summary judgment if one is brought.

(ii) Is there an identifiable class of two or more persons?

37 The class proposed by the plaintiff consists of all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.

38 The requirements of a class capable of certification were summarized by Strathy J. (as he then was), in *Fairview Donut Inc. v. TDL Group Corp.*, [2012] O.J. No. 834 (Ont. S.C.J.), at para. 220, as follows:

(a) membership in the class should be determinable by objective criteria without reference to the merits of the action;

(b) the class criteria should bear a rational relationship to the common issues asserted by all class members, but all class members need not share the same interest in the resolution of the asserted common issues;

(c) the class must be bounded and not of unlimited membership;

(d) there is a further obligation, although not onerous, to show that the class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues;

(e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation; and

(f) a proper class definition does not need to include only those persons whose claims will be successful.

39 The defendants attack the proposed class definition, primarily on the basis that it does not distinguish between dealers who signed Dealer Agreements before and after August, 2012 when changes were made to the commission structure and advertising subsidies. Specifically, the defendants assert that claims based on the August, 2012 changes are not tenable for the following groups of dealers:

(a) dealers who terminated Dealer Agreements prior to August, 2012;

(b) dealers who had Dealer Agreements as of 2012, and have allowed their agreements to be renewed since then; and

(c) dealers who entered into Dealer Agreements after August, 2012.

40 The defendants also argue that the class definition should exclude dealers who entered into Dealer Agreements with knowledge of this action.

41 I disagree with the defendants, and in my view the class definition as proposed is satisfactory.

42 I do not read the claim based on the August 2012 amendments in the same way as the defendants appear to read it. Putting aside issues under the *Arthur Wishart Act*, assuming it applies, I read the allegations respecting the August

2012 amendments as examples of Sears' breaches of the obligation of good faith. As I read it, the statement of claim alleges that prior to the August 2012 amendments, Sears was already in breach of its obligation to exercise its discretion under the Dealer Agreements in good faith, and the August 2012 amendments simply resulted in further detriment to the dealers. Fundamentally, the plaintiff alleges that any dealer who was subject to a Dealer Agreement suffered in the same way, although the amount of harm at any particular point in time might have been different.

43 I think the class as proposed is satisfactory and meets the criteria set out by Strathy J. in *Fairview Donut*, even though all class members do not share exactly the same interest in the resolution of one or more of the common issues.

(iii) Are there appropriate common issues?

44 The term "common issues" is defined in section 1 of the *Class Proceedings Act* as

a) common but not necessarily identical issues of fact, or

b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

45 The principles concerning the definition of appropriate common issues were summarized by Strathy J. in *Fairview Donut*, *supra*, at paras. 229 and 230, as follows:

a. the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;

b. an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution;

c. there must be a basis in the evidence before the court to establish the existence of common issues;

d. there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;

e. the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;

f. a common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;

g. the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation in the same manner, to each member of the class;

h. a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

i. where questions relating to causation or damages are proposed as a common issue, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;

j. common issues should not be framed in overly broad terms;

k. the core of a class proceeding is the element of commonality — there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this; and

l. the common issues should be clear, neutrally-worded and fair to both parties.

46 At the argument of the motion, I was furnished with revised proposed common issues by counsel for the plaintiff. They are as follows:

a. Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the obligation to exercise contractual discretion in good faith by:

i. Failing to increase commissions paid to class members;

ii. Reducing commissions paid to class members in August 2012;

iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commissions to the class members for good sold directly to customers located within the class members' Market Areas through direct channels (as described below);

iv. Removing or reducing local store advertising subsidies required under Schedule A, paragraph H of the Dealer Agreement;

v. Failing to provide a monthly accounting of how compensation was calculated as required under Schedule A, paragraph D of the Dealer Agreement; or

vi. Imposing handling fees payable by customers on catalogues sales made by dealers?

b. Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

c. If Sears Canada or Sears Roebuck has breached its contractual duties, or been unjustly enriched, what is the appropriate measure of past damages or compensation?

d. Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" or "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("*Wishart Act*") and similar provisions under franchise legislations otherwise governing any such class member? If so:

i. Are all class members entitled to the benefit of the *Wishart Act* by virtue of the choice of law provisions in the Sears standard Dealer Agreement?

ii. Did Sears breach the duty of fair dealing under s. 3 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member by any of the acts or omission set out in (a) (i) to (vi) above and, if so, what are the damages?

iii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member), at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof?

e. Did Sears fail to disclose the material facts particularized in paragraph 93 of the statement of claim to each dealer before the dealer signed the Dealer Agreement?

i. If so, directions pursuant to s. 25(2) of the CPA for the calculation of individual damages for misrepresentation or under s.7(1) of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member); and

f. What scale and quantum of costs should be awarded?

47 The plaintiff must show, through evidence, that there are appropriate common issues. The test is not a high one. The plaintiff must show that there is "some basis in fact" for the proposition that there are appropriate common issues: see *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477 (S.C.C.), at para. 99.

48 It is clear from *Cloud*, *supra*, that the resolution of the common issue or issues need not resolve the entire action. It is sufficient if it resolves an issue or issues that will move the action some distance. The fact that there may be many individual issues left to be determined does not mean that common issues should not be certified. As Goudge J.A. stated in *Cloud* at para. 53:

> In other words, an issue can constitute a substantial ingredient of the claims and satisfy s.5(1)(c) even if it makes up a very limited aspect of the liability questions and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s.5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than elucidate the various individual issues which may remain after the common trial.

In my view, the question of whether the individual issues will unduly dominate the action is more properly part of the preferability inquiry: *Cloud*, at paras. 73-76; and *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.).

49 Both parties have filed extensive evidence, primarily on the commonality issue.

50 While Sears asserts that there are some differences in the contractual arrangements, in that there were a variety of supplementary agreements with individual dealers, Sears does not argue that those differences are sufficient to disqualify reliance on the Dealer Agreement by the plaintiff as a basic common feature. Sears' argument, in the main, rests on the assertion that the plaintiff's allegations are founded on the effect of Sears' conduct on the members of the class, which will differ from dealer to dealer.

51 Sears points out that, in its simplest terms, the plaintiff's allegation is that dealers do not make enough money. Sears asserts that each of the allegations under proposed common issue (a) involves business practices by Sears that are alleged to be breaches of the duty of good faith or unjust enrichment because they contribute to or exacerbate the inadequate state of dealer compensation.

52 Sears submits that "adequacy" of dealer compensation is vague and subjective. In each case, what will be required is a determination of the negative impact of the alleged conduct by Sears, which is clearly an individual issue for each dealer. Determining whether there is negative impact would involve examining each dealer's revenues, expenses, and regional and local factors affecting each dealer, to determine whether the dealer is not making the requisite amount of profit, whatever that might be, and if so, whether that is due to Sears' business practices, to the dealer's own inadequate business practices, or to factors external to both parties.

53 Alternatively, if the plaintiff is attempting to say that Sears' alleged conduct had a negative impact on the whole class, the plaintiff must adduce evidence that such harm can be determined on a class-wide basis and has failed to do so.

54 The defendants primarily rely on *Fairview Donut*, *supra*; *Spina v. Shoppers Drug Mart Inc.*, [2013] O.J. No. 4979 (Ont. S.C.J.); and *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.* (2000), 138 O.A.C. 180 (Ont. Div. Ct.).

55 In my view, Sears' reliance on *Fairview Donut* is misplaced. While it is true that Strathy J. held that some of the common issues were not certifiable, he did say that an issue as to whether franchisees were required to sell baked goods at "commercially unreasonable" prices could be certified if structured properly. He relied on the decision of the Divisional Court in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252 (Ont. Div. Ct.), a decision that was affirmed by the Court of Appeal, (2010), 100 O.R. (3d) 721 (Ont. C.A.). At paras. 256 and 257 of *Fairview Donut*, Strathy J. stated:

> 256. On the other hand, in *Quizno's*, the Divisional Court was not concerned about the fact that the amount of loss or damage sustained by class members might vary from region to region or from time to time because of the "systemic" nature of the conduct potentially giving rise to liability. The system included a common contract, a common pricing

system and a common distribution system. It included the addition of mark-ups and sourcing fees by the franchisor on every single product, with an additional mark-up being added by the distributor. In *Quizno's*, the complaint was not just in relation to some products acquired by franchisees; it related to all the products they sold. Moreover, the plaintiff alleged that some forty percent of *Quizno's* franchisees were operating at a loss.

257 The majority of the Divisional Court held in *Quizno's* that the breach of contract claim gave rise to common issues. The issue of the commercial reasonableness of the defendants' mark-ups and sourcing fees could be addressed in common by examining the franchisor's conduct, the services it provided and industry standards.

56 I think Strathy J.'s reasoning as to the common features arising from the conduct of the defendant in that case is applicable here. As noted, the Divisional Court's decision in *Quizno's* was affirmed by the Court of Appeal.

57 In *Spina*, Perell J. certified a number of issues as common issues but declined to hold that Shopper's Drug Mart's budgeting process gave rise to a common issue. The process itself involved setting a specific budget for each store. There was simply insufficient commonality, even on the part of the defendant's conduct, to say that there was a certifiable common issue.

58 The Divisional Court's decision in *Bulk Barn* was considered by Strathy J. in *Fairview Donut*, at paras. 254 and 255, but he found more persuasive the Divisional Court's decision in *Quizno's*.

59 Closer to the facts of this case is *Mayotte v. Ontario* (2010), 99 C.P.C. (6th) 229 (Ont. S.C.J.). In that case, it was alleged that the Province of Ontario had under-compensated private issuers of driver's licences.

60 Perell J. held that the following issues were proper common issues:

a. Does the contractual relationship between Ontario and the private issuers include a duty on Ontario to ensure that Issuer compensation is, and remains fair, rational, objectively determined, and proportional to the effort required to do each transaction?

b. Does Ontario have one or more of the following contractual obligations to the private issuers in respect of compensation:

i. to adequately increase the standard commission rate table,

ii. to update the time series analysis on which compensation was and continues to be based,

iii. to take into consideration all steps required to perform the required transactions, and

iv. to sufficiently increase the annual stipend?

c. If so, has Ontario breached and is it continuing to breach any such contractual obligation?

d. Was Ontario under a duty to increase compensation to the private issuers following the conclusions of the report of the Ministry of Transportation dated August 28, 2003?

e. Has Ontario satisfied its duties by the increases in compensation which it has put into effect since August 28, 2003?

f. If Ontario has not breached its contractual duties to the private issuers in respect of compensation, has Ontario been unjustly enriched by having under-compensated the private issuers?

61 The defendant in *Mayotte* argued that to determine all or some of these questions it would be required that individual findings of fact be made about the circumstances of each contractual relationship. Perell J. disagreed. At para. 75, he stated "A trial judge might conclude that in the circumstances Ontario breached its contracts with all of the private

issuers as of August 28, 2003 when it is alleged that Ontario knew that the compensation rate paid to the private issuers was not fair, proportional, rational, or objective."

62 In the action before me, it is alleged that there is a common Dealer Agreement; dealers' compensation is fixed by a common formula; advertising subsidies are commonly fixed, with a few exceptions; and Sears sells directly into each dealer's Market Area. It is alleged that Sears knows that these features result in unreasonable rates of renummeration to dealers, which violates Sears' obligation to exercise its discretion under the dealers' agreements in good faith. In the alternative, it is alleged that Sears is unjustly enriched. If the *Arthur Wishart Act* applies, there are common questions as to whether it has been complied with. The resolution of the common issues will move the action a long way: *Cloud* at para. 82.

63 As did Perell J. in *Mayotte*, I think the questions set out in proposed common issues (a) and (b) are suitable common issues. However, there are amendments I will make in order to make them more neutral and fair to both sides.

64 As was the case in *Cloud*, there will be individual issues that must be determined. Assuming the plaintiff succeeds on the common issues, or some of them, the measure of damages for each member of the class will depend not only on the effect of Sears' conduct, but on the individual circumstances of each dealer. However, the common issues trial judge will have ample tools at his or her disposal to determine appropriate damages on a class-wide basis, or an individual basis, or both: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.). As was the case in *Markson*, damages can be certified as a common issue, but might also be determined individually. The common effect of Sears' conduct may give rise to damages that can be attributed to the class as a whole. There will likely also be damages that must be determined individually. That is something to be determined by the common issues trial judge after deciding the common issues.

65 Costs are not a common issue.

66 I have revised the proposed common issues, and they are attached to these reasons as Appendix A.

67 I am prepared to consider further revisions, which will be discussed at the next case conference.

iv. Is a class proceeding the preferable procedure for resolving the common issues?

68 The preferability inquiry involves answering two questions: first, would the class action be a fair, efficient and manageable method of advancing the claim? Second, would the class action be preferable to other reasonably available means of resolving the claims of class members? See *Cloud*, *supra*; and *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.).

69 As noted earlier in my discussion of *Cloud*, the preferability inquiry largely involves a determination of whether individual issues will overwhelm the common issues.

70 For the reasons discussed earlier, I do not think the individual issues will overwhelm the common issues. Undoubtedly, there will be a number of individual matters that need to be addressed after the resolution of the common issues, assuming the plaintiff is successful. As noted, damages will need to be assessed, and to some extent at least this will involve individual determinations.

71 However, as pointed out in *Markson*, the common issues trial judge has many tools at his or her disposal to deal with such issues once the common issues have been addressed.

72 I am not persuaded that the individual issues will overwhelm the common issues. As noted earlier, I think the resolution of the common issues will move the action a long way.

73 Assuming the common issues are proper and that the individual issues will not overwhelm them, the defendants do not suggest that there is any other reasonably available means of resolving the claims of class members. There is no

alternative procedure required by legislation. The only issue is whether a common issues trial is the preferable method, or whether individual trials commenced by individual members of the class are preferable. In my view, a common issues trial is the preferable method.

v. Is the plaintiff an appropriate representative plaintiff?

74 The plaintiff no longer operates a Hometown Store. Thus, it has no ongoing stake in the result of the litigation. At most, it will have a right to past damages.

75 The defendants point out that the plaintiff is now essentially a shell company, with no ability to satisfy a costs order.

76 James Kay, the principal of the plaintiff, swears that the plaintiff operated a Hometown Store from June, 2007 until it gave notice of termination of the Dealer Agreement in August, 2013, and the Agreement terminated effective December 14, 2013. He swears he has a real and genuine interest in resolving the issues in the lawsuit for himself and for the benefit of all dealers. He swears that the termination of the Dealer Agreement in no way affects his willingness and ability to be the class representative.

77 Mr. Kay swears that he is aware of the duties owed by the class representative to the class and he is committed to contributing his time, knowledge, energy and leadership to bringing the case to a successful conclusion.

78 Mr. Kay swears that neither he nor the corporate plaintiff have any interest in conflict with any of the members of the proposed class.

79 Mr. Kay has proposed a plan for proceeding with the action. He sets out a plan of proceeding which sets out a method of advancing the case on a timely basis, including notice to be sent to the class members; the furnishing of affidavits of documents and productions; examinations for discovery and motions arising therefrom; the exchange of expert reports; mediation; a pre-trial conference; and a common issues trial. Individual hearings, if any, would be conducted after the common issues trial.

80 Counsel for the defendants submits that the plaintiff is not a proper representative plaintiff. Counsel submits that the plaintiff has a conflict with other members of the class, in that it is no longer the operator of a Hometown Store. Counsel also submits that the plaintiff has no ability to satisfy a costs award. Counsel relies on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 41, where McLachlin C.J.C. stated:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).
>
> [Emphasis added]

81 In my view, that statement by McLachlin C.J.C. must be considered in light of the decision of the Court of Appeal in *Pearson*, *supra*, and the decision of Cullity J. in *Mortson v. Ontario (Municipal Employees Retirement Board)*, [2004] O.J. No. 4338 (Ont. S.C.J.).

82 At para. 95, of *Pearson*, Rosenberg J.A. stated:

> [95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338. In referring to the reasons of the motions judge in this case and the statement from Western Canadian Shopping Centres about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following, at paras. 91 and 94:

> The statements in [Western Canadian Shopping Centres] and *Pearson* are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have the result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place — a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of s.5(1)(e) of the CPA.
>
> . . . . .
>
> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class — or the specific terms of s.5(1)(e) — should be considered to require them to demonstrate this.

83 It is always open to the defendants to move under rule 56.01(1)(d) for security for costs, subject to any special considerations that may apply to class proceedings: see *Peter v. Medtronic Inc.* (2008), 66 C.P.C. (6th) 274 (Ont. S.C.J.); and *Dean v. Mister Transmission (International) Ltd.* (2009), 79 C.P.C. (6th) 181 (Ont. S.C.J.). In the meantime, I do not think the plaintiff should be disqualified as an appropriate representative plaintiff in a class proceeding simply on the basis that it does not have the ability to pay costs.

84 I do not think the plaintiff has any conflict of interest with the other class members. Its interests may not go as far as those of some other class members, but there is no conflict.

85 As far as the litigation plan is concerned, the defendants have not made any particular criticism of it, other than to submit that it is generic. It is clear that a motion to certify a class proceeding should not be defeated simply on the basis of deficiencies in a litigation plan. I am prepared to entertain any suggestions for amendments to the plan at the next case conference.

86 I am satisfied that the plaintiff is an appropriate representative plaintiff.

Disposition.

87 For the foregoing reasons, this action is certified as a class proceeding.

88 I assume that the parties can agree on the form and content of the formal order. If so, they should bring it to the next case conference and I will sign it. If they cannot agree, I will deal with any issues at the case conference.

89 I will entertain written submissions with respect to costs, not to exceed five pages together with a costs outline. Counsel for the plaintiff shall have five days to file submissions, and counsel for the defendants shall have an additional five days to respond. Counsel for the plaintiff shall have three days to reply.

Motion granted.

Appendix A

Common Issues

(a) Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:

i. Failing to increase commission paid to class members;

ii. Changing commissions paid to class members in August 2012;

iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;

iv. Changing local store advertising subsidies;

v. Failing to provide a monthly accounting of how compensation was calculated; or

vi. Imposing handling fees payable by customers on catalogues sales made by dealers?

(b) Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

(c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?

(d) Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" of "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*Arthur Wishart Act)*? If so:

i. Did Sears breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?

ii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

2016 ONSC 7451
Ontario Superior Court of Justice

1291079 Ontario Ltd. v. Sears Canada Inc.

2016 CarswellOnt 18702, 2016 ONSC 7451, 273 A.C.W.S. (3d) 735

1291079 ONTARIO LIMITED (Plaintiff) and SEARS CANADA INC. (Defendant)

Gray J.

Heard: November 29, 2016
Judgment: November 29, 2016
Docket: 3769/13

Counsel: Andy Seretis, for Plaintiff
Peter F.C. Howard, for Defendant

***Gray J.*:**

1 This action has been certified as a class proceeding. The plaintiff now proposes to bring a motion for partial summary judgment. This is opposed by the defendant, who submits that the entire matter should be allowed to proceed to trial.

Background

2 On June 11, 2014, I heard a motion to certify this action as a class proceeding. On September 8, 2014, I granted the motion.

3 The common issues that were certified are as follows:

a) Has Sears Canada, at any time since July 5, 2011 breached its obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:

i. Failing to increase commission paid to class members;

ii. Changing commissions paid to class members in August 2012;

iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for good sold directly to customers located within the class members' Market Areas through direct channels;

iv. Changing local store advertising subsidies;

v. Failing to provide a monthly accounting of how compensation was calculated; or

vi. Imposing handling fees payable by customers on catalogue sales made by dealers?

b) Has Sears Canada been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?

d) Is Sears Canada a "franchisor" within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c.3 (Arthur Wishart Act)? If so:

i. Did Sears Canada breach the duty of fair dealing under s.3 of the *Arthur Wishart Act* by any of the acts of omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?

ii. Was Sears Canada required to deliver to each class member a disclosure document within the meaning of s.5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

4 By way of a consent order, the following additional common issue was certified:

Is an express or implied term of the Dealer Agreements, or a requirement of the duty of fair dealing under the *Arthur Wishart Act*, that Sears would take reasonable measures to support and protect the Sears Hometown Store Network? If so, did Sears breach that term by reason of any of the conduct alleged in the Fresh as Amended Statement of Claim?

5 After I certified this action as a class proceeding, the parties agreed on a timetable for the action. That timetable was furnished to me in writing by counsel for the plaintiff on February 23, 2015. By an endorsement dated February 27, 2015, I approved the timetable.

6 While there had been some mention, during the certification motion, of the prospect that it might be beneficial to obtain an early determination of whether the parties were in the relationship of franchisor and franchisee as contemplated under the *Arthur Wishart Act (Franchise Disclosure)*, *2000*, (the "*AWA*"), there is no mention of such a prospect in the timetable that was furnished to me on February 23, 2015. What that timetable specified was the agreement to a discovery plan; the exchange of affidavits of documents; oral examinations for discovery; the answering of undertakings; the service of expert reports; refusals motions; mediation; and a common issues trial.

7 According to the affidavit material filed by the defendant, the parties agreed to a protocol for the exchange of evidence in electronic form as of July 23, 2015. The parties have exchanged documents in accordance with the protocol. As of June 23, 2016, the defendant had collected 1,496,162 documents; reviewed 131,577 documents; and produced 15,688 documents.

8 The parties attended a mediation before the Honourable Warren K. Winkler on October 14, 2015, but a resolution was not reached.

9 On or about March 3, 2016, the parties exchanged proposed revised timetables. Neither timetable contemplated a partial summary judgment motion. The defendants' proposed timetable was accepted by the plaintiff. It contemplates a common issues trial in September 2017.

10 On July 21, 2016, counsel for the plaintiff forwarded to counsel for the defendant a draft notice of motion for partial summary judgment. The draft summary judgment motion contemplated summary judgment on common issue (d) certified under the order dated September 8, 2014. For ease of reference, it reads as follows:

d) Is Sears Canada a "franchisor" within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c.3 (Arthur Wishart Act)? If so:

i. Did Sears Canada breach the duty of fair dealing under s.3 of the *Arthur Wishart Act* by any of the acts of omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?

ii. Was Sears Canada required to deliver to each class member a disclosure document within the meaning of s.5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

11 As part of the proposed summary judgment motion, the plaintiff contemplated an order directing individual hearings, inquiries and determinations under s. 25(1) of the *Class Proceedings Act* in respect of class members' claims under s.7 of the *AWA*, and directions relating to procedures to be followed to resolve them.

12 Counsel for the plaintiff, in his factum and in his submissions before me, made it clear that whatever the result of the partial summary judgment motion, the rest of the claims reflected in the Statement of Claim would, if not resolved, proceed to a common issues trial.

13 The defendant says it has incurred fees and disbursements of approximately $646,000 with respect to document collection, document review, and production.

14 On August 10, 2016, the plaintiff served its notice of motion and motion record for partial summary judgment. The notice of motion is substantially the same as the earlier draft. A date has been fixed for the hearing of the motion, on May 27, 2017.

15 In accordance with the timetable, the defendant delivered its written interrogatories on June 29, 2016. The plaintiff has not delivered its written interrogatories.

Submissions

16 Mr. Howard, counsel for the defendant, submits that the court should make an order staying the motion for summary judgment. He submits that it is not appropriate, in the circumstances, to allow a single issue to be severed and decided in advance of the common issues trial. This is particularly so, he submits, in view of what has occurred to date. The defendant has expended considerable resources in producing documents and advancing the litigation in accordance with the agreed-upon timetable.

17 Mr. Howard submits that to permit a single issue to be determined before the balance of the issues are determined by the common issues trial judge will do little or nothing to advance the objective of conducting the litigation in a proportionate, timely or cost-effective manner. Rather, it will have the potential to produce at least two final orders or judgments, with concomitant rights of appeal to be pursued separately.

18 Accordingly, Mr. Howard submits that the plaintiff should not be permitted to proceed with a motion for partial summary judgment. Rather, all issues should be determined at a common issues trial.

19 In the alternative, Mr. Howard submits that the plaintiff should pay a significant amount to compensate the defendant for costs thrown away based on the agreed-upon timetable. Had the plaintiff brought a motion for partial summary judgment early in the litigation, the defendant would not have undertaken the voluminous search for and production of documents, at considerable expense, that it did. At the very least, all of that work would have been postponed until after the motion for partial summary judgment had been concluded, and any appeals had been disposed of.

20 Mr. Seretis, counsel for the plaintiff, submits that the motion for summary judgment should be allowed to proceed as scheduled.

21 Mr. Seretis submits that the legal issue raised under common issues (d) (i) and (ii) can be disposed of quite simply, on a very straightforward record. It is primarily a legal issue: is the relationship between the parties one of franchisor and franchisee that is governed by the *AWA*? It is likely that there will be few facts in dispute on the issue, and the resolution of the issue is primarily one for legal argument.

22 Mr. Seretis submits that the motion judge has ample tools at his disposal to deal with any individual issues arising out of a partial summary judgment, assuming the plaintiff is successful, and it need not be assumed that the resolution of any individual issues will cause additional difficulty or cost. For example, it would be open to the motion judge to

order that any individual issues be determined at the same time as, or after, the common issues trial. There may be other avenues available to minimize cost and disruption.

23 For these reasons, Mr. Seretis submits that the motion for partial summary judgment should proceed.

24 Mr. Seretis submits that it is premature to contemplate whether the plaintiff should be required to compensate the defendant for any costs "thrown away". He submits that costs were not, in fact, thrown away, because they would have had to have been incurred, in any event, for the common issues trial.

Analysis

25 Section 12 of the *Class Proceedings Act* provides as follows:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

26 There can be little doubt that, pursuant to this provision, I have the authority to make an order prohibiting the bringing of a partial summary judgment motion if I think it is necessary to ensure a fair and expeditious determination of the action. Whether it is necessary to "stay" the summary judgment motion, or whether I can simply order that it not be brought or heard is beside the point.

27 At this point in the proceedings, the parties have moved some distance towards a common issues trial. They have proceeded under an agreed-upon timetable. I agree with Strathy J., as he then was, in *Fairview Donut Inc. v. TDL Group Corp.* (2010), 97 C.P.C. (6th) 198 (Ont. S.C.J.), at para. 10, that the court is not bound by a scheduling timetable agreed to by the parties. If I thought the bringing of a partial summary judgment motion would be beneficial in advancing the litigation in a proportionate, timely and cost-effective way, I would have no hesitation in allowing it, no matter what procedural timetable the parties had agreed to.

28 In this case, I am not persuaded that the bringing of a partial summary judgment motion is appropriate. In my view, it is best that all issues be determined at once at a common issues trial.

29 The appropriate principles respecting summary judgment motions were extensively canvassed by Karakatsanis J. in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.), and it is unnecessary to review her reasons in any depth. At para. 49, she stated that, among other things, the motion judge is to consider whether the summary judgment process is a proportionate, more expeditious and less expensive means to achieve a just result. At para. 60, she noted that if some claims will proceed to trial in any event, it may not be in the interests of justice to use the process, because it may run the risk of duplicative proceedings or inconsistent findings of fact.

30 In my view, to permit a partial summary judgment motion in this case will simply add to the expense, and may delay the resolution of the entire matter.

31 It is quite possible, if not probable, that the result of the summary judgment motion will be a final order or judgment. Counsel for the plaintiff has made it clear that it will not resolve the entire action. The balance of the action will proceed to a common issues trial. That will also result in a final order or judgment.

32 There is every likelihood that there will be two final orders or judgments, and two separate routes of appeal. I do not see how this is in any way proportionate, expeditious or cost-effective.

33 The difficulty is compounded, in my view, when one considers the stage at which the proposed summary judgment motion is being brought. The parties have had considerable disclosure, they have had mediation, and they have incurred considerable expense.

34 If a summary judgment motion had been brought immediately after certification, there might be more justification for it. Even then, it would be difficult, if not impossible, to avoid the problem of two final orders or judgments and two separate appeal routes. However, at least the significant document productions and consequent cost would have been avoided, or at least delayed.

35 Instead of advancing the litigation in a proportionate, expeditious and cost-effective way, the bringing of a partial summary judgment motion will do little more than add complexity and cost, and potentially create more than one final order or judgment with different appeal routes. Among other things, this would be contrary to the policy reflected in s. 138 of the *Courts of Justice Act*, which reads as follows:

> 138. As far as possible, multiplicity of legal proceedings shall be avoided.

36 In my view, multiplicity of proceedings will be avoided, in this case, if all matters in dispute proceed to a single trial conducted by the common issues trial judge.

Disposition

37 For the foregoing reasons, the plaintiff will not be allowed to proceed with a motion for partial summary judgment. The date fixed for the hearing of the motion is vacated.

38 As agreed, the defendant is awarded costs fixed in the amount of $5,000, all-inclusive, payable within 30 days.

Motion dismissed.

2001 SCC 68, 2001 CSC 68
Supreme Court of Canada

Hollick v. Metropolitan Toronto (Municipality)

2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 2001 SCC 68, 2001 CSC 68, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 108 A.C.W.S. (3d) 774, 13 C.P.C. (5th) 1, 153 O.A.C. 279, 205 D.L.R. (4th) 19, 24 M.P.L.R. (3d) 9, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 56 O.R. (3d) 214 (headnote only), 56 O.R. (3d) 214 (note), 56 O.R. (3d) 214, J.E. 2001-1971, REJB 2001-26157

John Hollick, Appellant v. The City of Toronto, Respondent and Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment, the Environmental Commissioner of Ontario and the Law Foundation of Ontario, Intervenants

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour JJ.

Heard: June 13, 2001
Judgment: October 18, 2001
Docket: 27699

Proceedings: affirming (1999), 32 C.E.L.R. (N.S.) 1 (Ont. C.A.); reversing in part (1998), 28 C.E.L.R. (N.S.) 198 (Ont. Div. Ct.); reversing (1998), 27 C.E.L.R. (N.S.) 48 (Ont. Gen. Div.)

Counsel: *Michael McGowan*, *Kirk M. Baert*, *Pierre Sylvestre* and *Gabrielle Pop-Lazic*, for Appellant.
Graham Rempe and *Kalli Y. Chapman*, for Respondent.
Robert V. Wright and *Elizabeth Christie*, for Interveners, Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment.
Doug Thomson and *David McRobert*, for Intervener, Environmental Commissioner of Ontario.
Written submissions only by *Mark M. Orkin, Q.C.*, for Intervener, Law Foundation of Ontario.

The judgment of the court was delivered by *McLachlin C.J.C.*:

1 The question raised by this appeal is whether the appellant has satisfied the certification requirements of Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and whether the appellant should accordingly be allowed to pursue his action against the City of Toronto as the representative of some 30,000 other residents who live in the vicinity of a landfill owned and operated by the City. For the following reasons, I conclude that the appellant has not satisfied the certification requirements, and consequently that he may pursue this action only on his own behalf, and not on behalf of the stated class.

I. Facts

2 The appellant Hollick complains of noise and physical pollution from the Keele Valley landfill, which is owned and operated by the respondent City of Toronto. The appellant sought certification, under Ontario's *Class Proceedings Act, 1992*, to represent some 30,000 people who live in the vicinity of the landfill, in particular:

> A. All persons who have owned or occupied property in the Regional Municipality of York, in the geographic area bounded by Rutherford Road on the south, Jane Street on the west, King Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991, or where such person is deceased, the personal representative of the estate of the deceased person; and

B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the *Family Law Act*) of persons who were owners and/or occupiers . . .

The merits of the dispute between the appellant and the respondent are not at issue on this appeal. The only question is whether the appellant should be allowed to pursue his action as representative of the stated class.

3 Until 1983, the Keele Valley site was a gravel pit owned privately. It operated under a Certificate of Approval issued by the Ministry of the Environment in 1980. After the respondent purchased the site in 1983, the Ministry of the Environment issued a new Certificate of Approval. The 1983 Certificate covers an area of 375.9 hectares, of which 99.2 hectares are actual disposal area. The remainder of the land constitutes a buffer zone. The Certificate restricts Keele Valley to the receipt of non-hazardous municipal or commercial waste, and it sets out various other requirements relating to the processing and storage of waste at the site. It also provides for a Small Claims Trust Fund of $100,000, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "offsite impact".

4 The Ministry of the Environment monitors the Keele Valley site by employing two full-time inspectors at the site and by reviewing detailed reports that the respondent is required to file with the Ministry. In addition, the City of Vaughan has established the Keele Valley Liaison Committee, which is meant to provide a forum for community concerns related to the site. Until 1998, the appellant participated regularly at meetings of the Liaison Committee. Finally, the respondent maintains a telephone complaint system for members of the community.

5 The appellant's claim is that the Keele Valley landfill has unlawfully been emitting, onto his own lands and onto the lands of other class members:

(a) large quantities of methane, hydrogen sulphide, vinyl chloride and other toxic gases, obnoxious odours, fumes, smoke and airborne, bird-borne or air-blown sediment, particulates, dirt and litter (collectively referred to as "Physical Pollution"); and

(b) loud noises and strong vibrations (collectively referred to as "Noise Pollution").

The appellant filed a motion for certification on November 28, 1997. In support of his motion, the appellant pointed out that, in 1996, some 139 complaints were registered with the respondent's telephone complaint system. (Before this Court, the appellant submitted that "at least 500" complaints were made "to various governmental authorities between 1991 and 1996" (factum, at para. 7).) The appellant also noted that, in 1996, the respondent was fined by the Ministry of Environment in relation to the composting of grass clippings at a facility located just north of the Keele Valley landfill. In the appellant's view, the class members form a well-defined group with a common interest *vis-à-vis* the respondent, and the suit would be best prosecuted as a class action. The appellant seeks, on behalf of the class, injunctive relief, $500 million in compensatory damages and $100 million in punitive damages.

6 The respondent disputes the legitimacy of the appellant's complaints and disagrees that the suit should be permitted to proceed as a class action. The respondent claims that it has monitored air emissions from the Keele Valley Site and the data confirm that "none of the air levels exceed Ministry of the Environment trigger levels". It notes that there are other possible sources for the pollution of which the appellant complains, including an active quarry, a private transfer station for waste, a plastics factory, and an asphalt plant. In addition, some farms in the area have private compost operations. The respondent also argues that the number of registered complaints — it says that 150 people complained over the six-year period covered in the motion record — is not high given the size of the class. Finally, it notes that, to date, no claims have been made against the small claims trust fund.

II. Judgments

7 The motions judge, Jenkins J., found that the appellant had satisfied each of the five certification requirements set out in s. 5(1) of the *Class Proceedings Act, 1992*: (1998), 27 C.E.L.R. (N.S.) 48 (Ont. Gen. Div.). He found that the

appellant's statement of claim disclosed causes of action under s. 99 of the *Environmental Protection Act*, R.S.O. 1990, c. E. 19, and under the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K. H.L.); that the appellant had defined an identifiable class of two or more persons; that the issues of liability and punitive damages were common to the class; and that a class action would be the preferable procedure for resolving the complaints of the class. Finally, he found that the appellant would be an adequate representative for the class and that the appellant had set out a workable litigation plan. Though Jenkins J. struck out the appellant's claim for injunctive relief on the ground that damages would be a sufficient remedy and rejected his claims under the *Family Law Act*, R.S.O. 1990, c. F. 3, on the grounds that the facts pleaded "cannot . . . establish a basis for a claim for loss of care, guidance, and companionship" (p. 62). Jenkins J. concluded that the appellant had satisfied the certification requirements of s. 5(1). Accordingly he ordered that the appellant be allowed to pursue his action as representative of the stated class.

8 The Ontario Divisional Court, *per* O'Leary J., overturned the certification order on the grounds that the appellant had not stated an identifiable class and had not satisfied the commonality requirement: (1998), 42 O.R. (3d) 473 (Ont. Div. Ct.). O'Leary J. interpreted the identifiable class requirement to require that "there be a class that can all pursue the same cause of action" against the defendant. He noted that "[t]o pursue such cause of action, the members of the class must have suffered the interference with use and enjoyment of property complained of in the statement of claim" (p. 479). O'Leary J. concluded that the appellant had not stated an identifiable class (at pp. 479-80):

> [T]he evidence does not make it likely that th[e] 30,000 [class members] suffered such interference. It cannot be assumed that the complaints made to Toronto make it likely that the landfill was the cause of the odour or thing complained about. . . . [E]ven if one were to assume that the Keele Valley landfill site was the source of all the complaints, 150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with.

For the same reasons, he concluded that the appellant had not satisfied the commonality requirement, writing that "[b]ecause the class that was certified . . . bears no resemblance to any group that was on the evidence likely injured by the landfill operation, there are no apparent common issues relating to the members of the class" (p. 480). O'Leary J. set aside the certification order without prejudice to the plaintiff's right to bring a fresh application on further evidence.

9 The Court of Appeal for Ontario, *per* Carthy J.A., dismissed Hollick's appeal ((1999), 46 O.R. (3d) 257 (Ont. C.A.)), agreeing with the Divisional Court that commonality had not been established. Citing *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.)), Carthy J.A. noted that the definition of a class should not depend on the merits of the litigation. However, he saw no bar to a court's looking beyond the pleadings to determine whether the certification criteria had been satisfied. "If it were otherwise", he noted, "any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court" (p. 264). Carthy J.A. acknowledged that a court should not test the existence of a class by demanding evidence that each member of the purported class have, individually, a claim on the merits. The court should, however, demand "evidence to give some credence to the allegation that . . . 'there is an identifiable class . . . '".

10 Carthy J.A. did not find it necessary to resolve the issue of whether the appellant had stated an identifiable class, because in his view the appellant had not satisfied the commonality requirement. In Carthy J.A.'s view, proof of nuisance was essential to each of the appellant's claims. Because a nuisance claim requires the plaintiff to make an *individualized* showing of harm, there was no commonality between the class members. Carthy J.A. wrote (at pp. 266-67):

> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance. . . .
>
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation.

Carthy J.A. dismissed the appeal, affirming the Divisional Court's order except insofar as it would have allowed the appellant to bring a fresh application on further evidence.

III. Legislation

11 *Class Proceedings Act, 1992*, S.O. 1992, c. 6

5. (1) The court shall certify a class proceeding on a motion under section 2,3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

IV. Issues

12 Should the appellant be permitted to prosecute this action on behalf of the class described in his statement of claim?

V. Analysis

13 Ontario's *Class Proceedings Act, 1992*, like similar legislation adopted in British Columbia and Quebec, allows a member of a class to prosecute a suit on behalf of the class: see Ontario *Class Proceedings Act, 1992*, s. 2(1); see also Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX; British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50. In order to commence such a proceeding, the person who seeks to represent the class must make a motion for an order certifying the action as a class proceeding and recognizing him or her as the representative of the class: see *Class*

Proceedings Act, 1992, s. 2(2). Section 5 of the Act sets out five criteria by which a motions judge is to assess whether the class should be certified. If these criteria are satisfied, the motions judge is required to certify the class.

14 The legislative history of the *Class Proceedings Act, 1992*, makes clear that the Act should be construed generously. Before Ontario enacted the *Class Proceedings Act, 1992*, class actions were prosecuted in Ontario under the authority of Rule 12.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. That rule provided that

> [w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

While that rule allowed courts to deal with relatively simple class actions, it became clear in the latter part of the 20th century that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 26. They often involved vast numbers of interested parties and complex, intertwined legal issues — some common to the class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise *ad hoc* solutions to procedural complexities on a case-by-case basis: see *Western Canadian Shopping Centres Inc.*, at para. 51. The *Class Proceedings Act, 1992*, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres Inc.* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": *Report on Class Actions, supra*, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclose[] a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Ont. Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the *form* of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33.

17 With these principles in mind, I turn now to the case at bar. The issue is whether the appellant has satisfied the certification requirements set out in s. 5 of the Act. The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J. H. Friedenthal, M. K. Kane and A. R. Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater*, *supra*, at pp. 175-76; *Western Canadian Shopping Centres Inc., supra*, at para. 38.

18 A more difficult question is whether "the claims . . . of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres Inc.*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class members' claims.

19 In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim — or at least what might be termed a "colourable claim" — against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see *Western Canadian Shopping Centres Inc.*, at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints against the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated *vis-à-vis* the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 people had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that:

> [i]n circumstances such as are described in the statement of claim one would expect to see evidence of the existence of a body of persons seeking recourse for their complaints, such as, a history of "town meetings", demands, claims against the no fault fund, [and] applications to amend the certificate of approval . . .

20 The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an air plane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

21 The requirement is not an onerous one. The representative need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class

be amended: see W. K. Branch, *Class Actions in Canada* (1998), § 4.205; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (Ont. S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.)) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).

22 The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. The recommendations of the Ontario Law Reform Commission's 1982 report on this point should perhaps be given limited weight because, as discussed above, those recommendations were made in the context of a proposal that the certification stage include a preliminary merits test: see *Report on Class Actions, supra*, vol. II, at pp. 422-26 (recommending that *both* the representative plaintiff and the defendant be *required*, at the certification stage, to file one or more affidavits setting out all the facts upon which they intend to rely, and that the parties be permitted to examine the deponents of any such affidavits). The 1990 Report of the Attorney General's Advisory Committee is perhaps a better guide. That Report suggests that "[u]pon a motion for certification . . . , the representative plaintiff *shall* and the defendant *may* serve and file one or more affidavits setting forth the material facts upon which each intends to rely" (emphasis added): see *Report of the Attorney General's Advisory Committee on Class Action Reform, supra*, at p. 33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

23 This appears to be the existing practice of Ontario courts. In *Caputo*, *supra*, the representative brought a class action against cigarette manufacturers claiming that they had knowingly misled the public about the risks associated with smoking. In support of the certification motion, the class representative filed only a solicitor's affidavit based on information and belief. The court held that the evidence adduced by the class representative was insufficient to support certification, and that the defendant manufacturers should be allowed to examine the individual class members in order to obtain the information required to allow the court to decide the certification motion. The "primary concern", the court wrote, is "[t]he adequacy of the record", which "will vary in the circumstances of each case" (p. 319).

24 In *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. The representative provided no evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that "the CPA requires the representative plaintiff to provide a certain *minimum evidentia[ry] basis* for a certification order" (emphasis added). While the *Class Proceedings Act, 1992* does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order."

25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see *Report*, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence."). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s.5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at § 4.60.

26 In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy

document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions — judicial economy, access to justice, and behaviour modification: see also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.); compare British Columbia *Class Proceedings Act*, s. 4(2) (listing factors that court must consider in assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues — common and individual — raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.

28 The Report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation, and so on": *Report of the Attorney General's Advisory Committee on Class Action Reform, supra*, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.

29 The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the *common issues*" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes,

> The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinction[] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, *supra*, at § 4.690. I would endorse that approach.

30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the

members of the class predominate over any questions affecting only individual members"); see also British Columbia *Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, *given all of the circumstances of the particular claim*, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (1993), at p. 27.

31 I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": see *Report of the Attorney General's Advisory Committee on Class Action Reform, supra*, at p. 32; see also Cochrane, *supra*, at p. 27; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (loose-leaf), at § 3.62 ("[a]s part of the determination with respect to preferability, it is appropriate for the court to review alternative means of adjudicating the dispute which is before it"). In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

32 I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints — those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

33 Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. As noted above, one important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all. I am not fully convinced, however, that this is the situation here. The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action — even if the compensatory scheme promises to provide redress more quickly: see *Rumley v. British Columbia*, 2001 SCC 69 (S.C.C.), at para. 38. The existence of such a scheme, however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns.

34 For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in *Western Canadian Shopping Centres Inc.*, *supra*, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28; *Environmental Protection Act*, R.S.O. 1990, c. E.19. I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.

35 I would note, further, that Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification: see *Environmental Bill of Rights, 1993*, ss. 61(1) (stating that "[a]ny two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister") and 74(1) (stating that "[a]ny two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister"); *Environmental Protection Act*, ss. 14(1) (stating that "[d]espite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect"); 172(1) (stating that "[w]here a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may, within fourteen days after the injury or damage becomes apparent, request the Minister to conduct an investigation"); and 186(1) (stating that "[e]very person who contravenes this Act or the regulations is guilty of an offence").

36 I conclude that the action does not meet the requirements set out in s. 5(1) of Ontario's *Class Proceedings Act, 1992*. Even on the generous approach advocated above, the appellant has not shown that a class action is the preferable means of resolving the claims raised here.

37 I should make one note on the scope of the holding in this case. The appellant took pains to characterize this case as raising the issue of whether Ontario's *Class Proceedings Act, 1992* permits environmental class actions. I would not frame the issue so broadly. While the appellant has not met the certification requirements here, it does not follow that those requirements could never be met in an environmental tort case. The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts.

38 The appeal is dismissed. There will be no costs to either party.

Appeal dismissed.

Pourvoi rejeté.

2010 ONSC 5390
Ontario Superior Court of Justice

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.

2010 CarswellOnt 7479, 2010 ONSC 5390, [2010] O.J. No. 4208, 100 C.P.C. (6th) 274, 192 A.C.W.S. (3d) 1099

2038724 ONTARIO LTD. and 2036250 ONTARIO INC. (Plaintiffs) and QUIZNO'S CANADA RESTAURANT CORPORATION, QUIZ-CAN LLC, THE QUIZNO'S MASTER LLC, CANADA FOOD DISTRIBUTION COMPANY, GORDON FOOD SERVICE, INC. AND GFS CANADA COMPANY INC. (Defendants)

Perell J.

Judgment: October 1, 2010 *
Docket: 06-CV-311330CP

Counsel: Allan D.J. Dick, David Sterns for Plaintiffs
Geoffrey B. Shaw, Timothy Pinos, Eunice Machado for Defendants, Quizno's Canada Restaurant Corporation, Quiz-Can LLC, the Quizno's Master LLC, Canada Food Distribution Company
Katherine L. Kay, Mark E. Walli for Defendants, Gordon Food Service, Inc., GFS Canada Company Inc.

***Perell J.*:**

Introduction

1 Reversing my judgment, which was reported *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252 (Ont. S.C.J.), the Divisional Court conditionally certified this action as a class proceeding; see (2009), 96 O.R. (3d) 252 (Ont. Div. Ct.). The Court of Appeal affirmed the judgment of the Divisional Court; see: (2010), 100 O.R. (3d) 721 (Ont. C.A.).

2 The Divisional Court remitted the costs of the certification motion and the motions that preceded the certification motion to be fixed on a partial-indemnity scale.

3 The successful Representative Plaintiffs now seek costs of *$596,304.00* of which $493,177.00 is for fees inclusive of GST and $103,127.00 is for disbursements inclusive of GST. (GST was 6% until December 31, 2007 and 5% from January 1, 2008.

4 The most significant disbursement is that of the expert witness fee of Dr. Andy Baziliauskas in the amount of $72,732.46.

5 The following chart breaks down just the counsel fee portion of the Representative Plaintiffs' costs claim ($466,813.50) by procedural event, of which the Representative Plaintiffs have identified 13 events. (I have not included the details of who provided the particular services.)

Event	Services	Counsel Fee (partial indemnity)
1. Certification Motion Records	Research, attendances with client and counsel; prepare, serve and file Plaintiff's Certification Motion Records; receipt/review Quiznos' and GFS Responding Motion Records	$77.413.50

2. Quiznos' Motion for Security for Costs	Review motion material; prepare responding motion material; attend cross-examinations of D. Johnson and M. Walli; preparation and argument of motion (two attendances)	$29,645.00
3. Quiznos' Motion to Strike Statement of Claim and to Strike Portions of Johnson Affidavit	Review motion material; prepare responding material; prepare and argue motion	$30,572.50
4. Motion to Strike Affidavit of Andy Baziliauskas	Review motion material; prepare responding material; prepare and argue motion	$9,680.00
5. GFS Motion to Dismiss Claim	Review motion material; prepare responding material; prepare and argue motion	$21,765.00
6. Cross-Examinations on Certification Motion	Attendance on 14-day for cross-examinations	$68,410.00
7. Undertakings and Refusals from Cross-examinations	Prepare and attend on refusals motion	$28,910.00
8. Case Conferences	Four case conferences	$35,882.50
9. Research and Drafting Factums for Certification Motion	Preparing factum and reviewing responding factums	$68,090.00
10. Prepare and Argue Certification Motion	Prepare and Argue Certification Motion	$77,520.00
11. Costs Submissions on Certification Motion	Costs Submissions	$10,625.00
12. Draft Certification and Costs Orders on Certification Motion	Drafting and Settling Certification Order	$3,940.00
13. Prepare Bill of Costs for Certification Motion	Prepare Bill of Costs and Submissions	$4,360.00
		Total: $466,813.50

6 The proceeding up to certification was complex and tenaciously contested.

7 The run-up to the motion took two years. There were a series of case conferences and numerous interlocutory motions. The certification motion was argued over 4.5 days, although a portion of the hearing was consumed by a motion for a stay for which the Representative Plaintiffs have already been awarded costs in the amount of $51,635.85.

8 The Representative Plaintiffs' lawyers prosecuted the action on a contingent fee basis. The senior lawyers on the file were Mr. Allan D.J. Dick and Mr. David Sterns, who are experienced class action counsel.

9 Before my decision was reversed by the Divisional Court, the Quiznos Defendants, who were originally successful on the certification motion but unsuccessful on the motion for a stay, sought costs on the certification motion from the Plaintiffs on a partial indemnity basis in the amount of $641,943.00, all inclusive of fees, disbursements, and GST.

10 The GFS Defendants (Gordon Food Service, Inc and GFS Canada Company Inc.), who were originally successful on the certification motion, sought costs on the certification motion on a partial indemnity basis in the amount of $200,848.93, all inclusive of fees, disbursements and GST.

11 My decision on the first round of costs claims is reported as *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2008] O.J. No. 2276 (Ont. S.C.J.).

12 On the original decision about costs, subject to certain set-offs, I awarded the Quiznos Defendants $212,902.54 payable forthwith and $73,076.08 in the cause. Costs claims totaling $136,630.08 were deferred and $52,842.70 of costs claims were disallowed or withdrawn.

13 On the original decision about costs, subject to certain set-offs, I awarded the GFS Defendants $74,418.55 payable forthwith and $4,455.00 in the cause. Costs claims totaling $53,656.70 were deferred and $41,865.75 of costs claims were disallowed.

14 In my original decision about costs, I discussed how the court should approach the fixing of costs in the context of proposed class proceedings. In paragraphs 15 to 25, I stated:

> 15. In the context of a class proceeding, the principles to apply when awarding costs are still a work in progress. To date, most of the discussion in the case law has focused on subsection 31(1) of the *Class Proceedings Act, 1992*, which I discussed at some length in *Ruffolo v. Sun Life Assurance Co. of Canada*, [2008] O.J. No. 599 (S.C.J.). Subsection 31(1) states:
>
> > 31.(1) In exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.
>
> 16. In enacting subsection 31(1), the legislature did not adopt the recommendation of the Ontario Law Reform Commission that class actions should not be governed by the costs rules that govern individual actions. Thus, in class actions, the approach to fixing costs is the same as in ordinary actions, but the court should give special weight to whether the class action was a test case, raised a novel point of law, or involved a matter of public interest: *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 (S.C.J.) at para. 32; *Joanisse v. Barker*, [2003] O.J. No. 4081 (S.C.J.); *Garland v. Consumers' Gas Co.* (1995), 22 O.R. (3d) 767 (Gen. Div.), aff'd (1996) 30 O.R. (3d) 414 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 5514 (S.C.J.); *Sutherland v. Hudson's Bay Co.*, [2008] O.J. No. 602 (S.C.J.) at para. 11.
>
> 17. Thus, in class actions, the ordinary rule is that costs will follow the event: *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 (C.A.) at para. 13; *Attis v. Canada (Minister of Health*, [2007] O.J. No. 2990 (S.C.J.); *Smith v. The Canadian Tire Acceptance Ltd.* (1995), 22 O.R. (3d) 433 (Gen. Div.) at 449, aff'd (1995), 26 O.R. (3d) 94 (C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 12; *Gariepy v. Shell Oil Co*., [2002] O.J. No. 3495 (S.C.J.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44 at paras. 60-71. The effect of subsection 31(1) is to encourage the court to recognize that class actions tend toward being test cases, the determination of a novel point of law, or the adjudication of matters of public interest, and, therefore, courts should be alert to and respond to these tendencies when making decisions about costs: *Ruffolo v. Sun Life Assurance Co. of Canada*, [2008] O.J. No. 599 (S.C.J.) at para. 51.
>
> 18. In the case at bar, both the stay motion and the certification motion raised important issues, and the parties' litigation may have contributed to the development of the law, but, in my opinion, neither motion should be regarded as being a test case, as raising a novel point of law, or as being a matter of public interest in the requisite sense. The motions for a stay and for certification were essentially hard-fought motions where the litigants were advancing their own causes and commercial interests with little altruistic motivation.
>
> 19. However, that is not to say that the court should exercise its discretion about costs without having regard to the context that the Plaintiffs commenced their action under the *Class Proceedings Act, 1992.* Where there is a class action, in exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court should always keep in mind the legislature's goals in enacting the *Class Proceedings Act, 1992*: *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, [2007] O.J. No. 1453 (Div. Ct.). Those

goals, which are now very well known, are the goals of access to justice, behaviour modification, and judicial economy.

20. In my opinion, keeping in mind the goals of the *Class Proceedings Act, 1992* means, in practical terms, that the court should not only be sensitive to whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest, but the court should be prepared to exercise its discretion about costs creatively and flexibly using all of the discretionary tools available. This may mean developing some hybrid and complex orders that preserve access to justice, which is what I propose to do for the case at bar.

21. In this regard, in using all of the discretionary tools available when making a costs award for proceedings governed by the *Class Proceedings Act, 1992*, the tool of "costs in the cause" is particularly helpful. An order of costs in the cause, however, has become somewhat unconventional. Under Rule 57.03 (Costs of a Motion) of the *Rules of Civil Procedure*, the conventional award of costs for motions is to "fix the costs of the motion and order them to be paid within 30 days." The court, however, reserves the discretion of making a different order if "satisfied that a different order would be more just."

22. The policy behind rule 57.03 is that the immediate payment of costs discourages unnecessary motion activity by confronting a party with immediate consequences for an unsuccessful motion or for an unsuccessful defence of a motion. This policy, however, is not applicable to a certification motion, which is a necessary motion in the context of a class proceeding, and thus other policies that are a better fit with the goals of the *Class Proceedings Act, 1992* should be considered.

23. In this regard, it should be noted that one purpose of a class proceedings is that in the case of a mass wrong, a class action balances the economics of litigation that normally favour the defendant. Visualize: if a defendant wrongs a group of persons, the defendant's investment in mounting a defence to one claimant's case typically has utility for resisting other claimants' cases; however, in contrast, without a class proceeding, a plaintiff's investment in his or her litigation has no additional economic utility because it usually cannot be shared by the next claimant. These phenomena are discussed by Craig Jones in *Theory of Class Actions* (Toronto: Irwin Law, 2003) at pp. 22-24, where he states:

> In the "traditional" or individualistic legal regime, a tort action may be viewed as connecting the tortfeasor on one hand and its victim on the other. In a mass tort, by comparison, the tortfeasor lies at the hub of the actions which might be seen to radiate from the decisions made at the centre. Viewed in this way, it is not difficult to see how the economy of scale in a dispute resolution process will naturally favour the defendant who can reuse the work product involved in the defence of issues common to all claims. Not so the numerous plaintiffs, who must begin anew with each new case, even on the common issues. This dichotomy is at the heart of mass tort — the defendant has mass-produced the wrong; the plaintiffs suffer the harm and bear the costs individually. This "structural asymmetry" has been called a systemic bias in favour of defendants ...
>
> It is not difficult to foresee the results of structural asymmetry in the individual litigation of mass torts. Mass tort defendants will tend to overspend on litigation in individual suits because their economy of scale permits them to invest in each initial claim an amount far greater than the claim is worth; this strategy makes success more likely in the early suits, compounding the advantage in the aggregate. Faced with such unequal litigation power, suits are discouraged or settled for too little, and confidentiality agreements extracted by defendants at the time of settlement may preclude "free riders" from taking full advantage of the work that has been done before, while the defendant is free to do so.

24. At page 25, Mr. Jones adds:

> For these reasons, mass tort theorists increasingly accept that a fundamental — some would say the *only* fundamental — reason for aggregating litigation is to redress the imbalance between mass tort defendants and plaintiffs, to "level the playing field" so that plaintiffs can enjoy the economies of scale that defendants have always exploited, and thereby increase their recovery.

> 25. I mention this theory about class actions because it lends support to the idea that the court should consider costs awards that sustain the value of a party's investment in his or her litigation until the outcome, which is another way of saying that courts should be willing to use all the venerable tools of different types of costs awards, including ordering costs in the cause or deferring an award of costs.

15 To these comments, I have additional observations about the court's approach to costs in the context of class proceedings and now in the particular context of a motion for certification where the representative plaintiff is successful and then claims costs.

16 I begin with a proposition that but for a submission made by the Representative Plaintiffs in their Reply Costs Brief, I would have thought obvious and fundamental. It is the proposition that representative plaintiffs and defendants in class proceedings are entitled to access to justice and that the plaintiffs and the defendants in class actions are subject to the same law that guides the court's discretion in awarding or in declining to award costs and in deciding the scale of costs and the manner in which costs are payable.

17 In their Reply, however, the Representative Plaintiffs submit although the court has the discretion to order part of the *defendants*' costs to be in the cause to preserve access to justice, this consideration does not apply in reverse. I disagree, defendants, just as much as plaintiffs, are entitled to access to justice, and the court in exercising its discretion must be aware of the access to justice implications of its award to both plaintiffs and defendants.

18 The court should also be aware that the procedure of a class action is meant to level the playing field not tip the field in the favour of plaintiffs.

19 I am not suggesting that this necessarily occurred in the case at bar, but a class proceeding should not become a means for either defendants or plaintiffs to overspend on legal expenses simply because the economies of scale of a class proceeding makes it worthwhile to enlarge the investment in the defence or prosecution of the case.

20 In the order I made in the original decision about costs, I attempted to be fair to both parties, and I attempted to make an order that would preserve the successful party's investment in the litigation until a decision could fairly be made to determine whether they should recover that investment in costs. That attempt was reflected in making part of the costs order payable in the cause.

21 The fairness of costs in the cause is that sometimes it is just to require that a party succeed on the merits of his or her claim or defence as a prerequisite to recovering costs for an interlocutory motion that does not determine the merits of the action but decides a procedural or evidentiary matter. The same approach is sometimes used in ordering costs for interlocutory injunctions, where the costs are made payable in the cause to reflect the possibility that in hindsight the plaintiff was not entitled to any remedy.

22 The *Class Proceedings Act, 1992*, S.O. 1992, requires a plaintiff to bring a motion to have his or her action certified as a class proceeding. The motion is mandatory, and defendants are entitled to resist the motion. Even when a defendant's resistance is futile in the sense that the plaintiff will inevitably be able to satisfy all of the criteria for certification, the defendant's resistance may be productive because the certification motion may prune aspects of the class proceeding that would not serve the purposes of the Act of access to justice, behaviour modification, and judicial economy, of which the most important by far is access to justice.

23 An order that a portion of the plaintiff's costs should be in the cause allows the court to do justice in accordance with the exigencies of the particular certification motion and recognizes that it was reasonable for the defendant to oppose the certification motion, which it entitled to do, and which resistance may be productive and even in the interests of class members, who will have a proceeding that is manageable and the preferable procedure to achieve access to justice.

24 In class proceedings, having the discretion to make flexible costs orders, including orders that costs are in the cause, allows the court to exercise some control over how the parties manage the litigation and encourages the appropriate use of legal resources.

25 I am, once again, not suggesting that costs mongering occurred in the case at bar by either side, but judges that manage class actions have observed that because of the contingent fee arrangements that drive class proceedings "overlawyering and an overgenerous expenditure of time are endemic in class proceedings." See *Sutherland v. Hudson's Bay Co.*, [2006] O.J. No. 2009 (Ont. S.C.J.) at para 20, *per* Justice Cullity; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 2043 (Ont. S.C.J.) at para. 10, *per* Justice E.M Macdonald.

26 On the plaintiff's side, contingent fee agreements encourage overlawyering because of the absence of the restraints that exist when paying clients scrutinize the legal services. However, there are other causes of overlawyering. Opportunism can also explain why class counsel might invest significant amounts of time in a certification motion and beyond what is necessary for the purposes of achieving certification.

27 The certification motion becomes an opportunity for the representative plaintiff to recover costs, really class counsel recovering on their investment in the litigation that would otherwise be recoverable only if the representative plaintiff were successful in the action. An order for costs in the cause, however, ensures that a representative plaintiff does not use a certification motion as a way to recover costs that would otherwise not be fairly recoverable until later in the action, if at all, given the outcome of the litigation. The order of costs in the cause preserves the claim for costs until it can be determined that the plaintiff deserves to recover those costs.

28 In the case at bar, however, the representative plaintiffs submit that an order of costs of the cause would be inconsistent with the Divisional Court's directions in this case, with the authority of *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 389 (Ont. Gen. Div.), and with the general practice on interlocutory motions codified in rule 57.03 (1).

29 I disagree; there is nothing in the Divisional Court's reasons, *Robertson v. Thomson Corp.* or general practice, that impedes my discretion about costs. The Divisional Court's direction does not suggest that there were any errors in principle in the approach that I used in the original decision about costs, and the Divisional Court describes my original approach as careful and detailed. In its Costs Endorsement, the Divisional Court stated:

> Perell, J. is in the best position to deal with costs of the certification motion. It was heard over 4.5 days. In support of the certification motion, there were expert reports and cross-examinations. There were many motions leading up to it. Justice Perell's careful and detailed reasons for costs following the certification motion, demonstrate that he is in the best position to evaluate the claim. Our own experience is limited to the appeal. The issue of costs of the certification and other motions is referred to Perell, J. for determination.

30 In *Robertson v. Thomson Corp.*, *supra*, Justice Sharpe said that although a certification motion is similar to a motion for an injunction in that neither type of motion decides the merits of a claim, a certification motion is different because it is a mandatory motion and intended to screen claims that are not appropriate for class action treatment. He said that those differences justify a different regime for costs orders, including the payment of costs forthwith than might not be appropriate for an injunction motion.

31 However, an order that a portion of the plaintiff's costs be in the cause and that another portion be payable forthwith is not inconsistent with Justice Sharpe's ruling in *Robertson*, and, in any event, an absolute rule that the representative plaintiff is always entitled to its costs of a successful certification motion payable forthwith would sterilize the court's

discretion, negate some of the functions performed by costs orders, and further reduce any restraint on class counsel from overworking the file or using the certification motion as an indirect means to finance the balance of the litigation on the back of an opponent who has yet to have been found liable. Moreover, there is no suggestion in *Robertson v. Thomson Corp.*, *supra*, that the court does not have the jurisdiction to order costs in the cause where appropriate to do so.

32 Accordingly, I will employ the same approach for fixing costs that I used in the original costs determination. I will order some costs and disbursements payable forthwith and some costs and disbursements payable in the cause. I will defer some costs and disbursements, and I will disallow some costs and disbursements. I will also allow offsets to the GFS Defendants and to the Quiznos Defendants, for reasons that I will describe below.

33 To be more precise, subject to the offsets, described below:

(a) for counsel fees, I award the Representative Plaintiffs $251,023.35 payable forthwith, plus GST to be calculated;

(b) for counsel fees, costs claims totaling $35,882.50 are deferred;

(c) for counsel fees, $121,985.00 of costs are disallowed;

(d) for disbursements, I award $21,778.12 inclusive of GST, payable forthwith; and,

(e) for disbursements $81,348.88, inclusive of GST are in the cause.

34 I award the GFS Defendants an offset of $12,504.60 and the Quiznos Defendants an offset of $11,001.90.

35 I leave it to the parties to calculate the GST which goes with each costs award.

36 The following chart provides the details of my costs awards in accordance with the 13 events identified by the Representative Plaintiffs. Where I have not accepted the quantum, I have crossed out the request and substituted my award. I will follow this chart with my explanation for the various determinations.

Event	**Award**	**Counsel Fee (partial indemnity)**
1. Certification Motion Records	Payable forthwith	$77.413.50
2. Quiznos' Motion for Security for Costs	Payable forthwith	~~$29,645.00~~ $1,500.00
3. Quiznos' Motion to Strike Statement of Claim and to Strike Portions of Johnson Affidavit	Payable forthwith	~~$30,572.50~~ $5,000.00
4. Motion to Strike Affidavit of Andy Baziliauskas	Offset to GFS Defendants in the amount of $12,504.60 and offset to Quiznos Defendants in the amount of $11,001.90.	~~$9,680.00~~ $0.00
5. GFS Motion to Dismiss Claim	Payable Forthwith	~~$21,765.00~~ $20,000.00
6. Cross-Examinations on Certification Motion	No order.	~~$68,410.00~~ $0.00
7. Undertakings and Refusals from Cross-examinations	No order.	~~$28,910.00~~
8. Case Conferences	Deferred	$35,882.50
9. Research and Drafting Factums for Certification Motion	Payable Forthwith	$68,090.00
10. Prepare and Argue Certification Motion	Payable Forthwith	$77,520.00
11. Costs Submissions on Certification Motion	No Costs	~~$10,625.00~~ $0.00
12. Draft Certification and Costs Orders on Certification Motion	Payable forthwith	~~$3,940.00~~ $1,500.00

13. Prepare Bill of Costs for Certification Motion	No costs	~~$4,360.00~~ $0.00

37 Events 1, 9, and 10 are costs associated with the certification motion and should be paid forthwith. I appreciate that class counsel have adjusted their hourly rate upwards from the amounts that were used on the original assessment of costs for the stay motion and certification motion. The rates are appropriate for this case. I see nothing insidious in the after-the-fact adjustment in the rates. There is no estoppel, and the Defendants should be prepared to pay an appropriate rate for the case. It is for the court to determine whether the rate is fair and reasonable. I have no reason to second guess the hours worked, and, in my opinion, these fees are commensurate with what the unsuccessful party might reasonably expect in the particular circumstances of what was a vigorously contested certification motion.

38 With respect to event 2 (Quiznos Motion for Security for Costs), Justice Hoy dismissed this motion at the same time as she granted a motion for security for costs brought by the GFS defendants. The GFS Defendants were awarded $1,500. I think that this is the appropriate sum to award the Representative Plaintiffs, payable forthwith.

39 With respect to event 3 (Quiznos Motion re Statement of Claim and re Johnson Affidavit), I understand that the Representative Plaintiffs were successful on this motion after five lawyers expended 127.2 hours on what amounts to an interlocutory motion about pleadings. This is excessive and beyond the reasonable expectations of a losing party. I award $5,000 payable forthwith.

40 With respect to event 4, (Motion to Strike Dr. Baziliauskas' affidavit), the Representative Plaintiffs were unsuccessful on this motion. On the original assessment of costs, I awarded the GFS defendants $12,504.60 for this motion in any event of the cause and payable forthwith. I see no reason to change my mind and this sum should be offset against the costs payable by the GFS defendants. Similarly, I awarded the Quiznos Defendants $11,001.90 on the original assessment of costs, and this sum should be offset against the costs payable by the Quiznos Defendants.

41 With respect to event 5, on the original determination about costs, I awarded the Representative Plaintiffs a $20,000 set-off for their success on GFS's motion to dismiss. I see no reason to change that award.

42 With respect to event 6 (cross-examinations on certification motion), I addressed this matter in my original decision about costs, where the parties took a variety of positions about this item. I concluded that the fair result was to order each party to bear their own costs notwithstanding that under rule 39.02 (4), the presumptive approach is that a party pays for the cross-examinations it initiates and the costs can be then offset. I decided that rather than proceeding with setoffs, it was fair to have each party absorb their own costs. I have not been persuaded to change my mind about this item. Rule 39.02 (4) provides that the court may order otherwise than the regime described by the rule.

43 With respect to event 7 (undertakings and refusals motion), success was divided and there should be no order as to costs.

44 With respect to event 8 (case conferences), I have deferred any award. Case conferences are not always adversarial and thus present problems about whether or not it is appropriate to order costs of what might be a co-operative meeting designed to advance the class proceeding. Speaking generally, I think that the outcome of the litigation may be a relevant factor in determining whether costs should be awarded for a case conference, although in some situations it would be appropriate to order costs of a case conference immediately. This case is not one of those situations. In the case at bar, I think the appropriate order is to defer the costs claim for case conferences rather than rule for it or against it at this time.

45 With respect to events 11 (costs submission on certification motion) and 13 (bill of costs for certification motion), I conclude that each party should bear their own costs. Success has been divided.

46 With respect to event 12 (draft certification order), this event is like events 1, 9, and 10, but I have adjusted the quantum.

47 In their costs submissions, the Representative Plaintiffs seek interest on the costs award and a departure from the ordinary rule that post-judgment interest runs from the date on which costs are fixed. There is no reason to depart from the ordinary rule.

48 Turning now to the matter of the disbursements. The Representative Plaintiffs seek $103,127 in disbursements, of which $81,348.88, inclusive of GST, if for the expert witness fee of Dr. Baziliauskas. With the exception of the witness fee, I conclude that these costs, ie. $21,778.12, should be payable to the Representative Plaintiffs forthwith.

49 As for Dr. Baziliauskas' witness fee, I see no reason to change the approach I used on the original decision about costs in my treatment of the Defendants' claim for this type of disbursement. I order this disbursement be in the cause. The merits of Dr. Baziliauskas' opinion remains a very live issue in this class action and on in the cause order seems particularly suitable.

50 Order accordingly.

Order accordingly.

Footnotes

* Leave to appeal refused at *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2011), 2011 CarswellOnt 823, 2011 ONSC 859 (Ont. Div. Ct.).

2009 CarswellOnt 4602
Ontario Superior Court of Justice

Tas-Mari Inc. v. Dibattista*Gambin Developments Ltd.

2009 CarswellOnt 4602, 179 A.C.W.S. (3d) 825, 63 B.L.R. (4th) 228, 85 C.L.R. (3d) 83, 85 R.P.R. (4th) 196, 97 O.R. (3d) 579

TAS-MARI INC. (Plaintiff) and DIBATTISTA*GAMBIN DEVELOPMENTS LIMITED (Defendant)

DIBATTISTA*GAMBIN DEVELOPMENTS LIMITED (Plaintiff by Counterclaim) and TAS-MARI INC., DOMENIC TASSONE and OTTAVIO TASSONE (Defendants by Counterclaim)

DIBATTISTA*GAMBIN DEVELOPMENTS LIMITED (Plaintiff) and FERNBROOK HOMES (CREDITVIEW) LIMITED, NICK CORTELLUCCI, GINO DIGENOVA, DANNY SALVATORE, BALLANTRY HOMES (FLETCHER'S MEADOW) INC., DAVID HILL, DAVID N. HILL, ATUL VANMALI, DEVONLEA ESTATES INC., BOBBY BHOOLA, HAWKSVIEW ESTATES INC., STANLEY CASH, TOM SCHONBERGER, TAS-MARI INC., DOMENIC TASSONE and OTTAVIO TASSONE (Defendants)

BALLANTRY HOMES (FLETCHER'S MEADOW) HAWKSVIEW ESTATES INC. and DEVONLEA ESTATES INC. (Plaintiffs by Counterclaim) and DIBATTISTA*GAMBIN DEVELOPMENTS LIMITED (Defendant by Counterclaim)

Gray J.

Heard: February 17-20, 2009; March 3, 2009
Judgment: August 5, 2009
Docket: Brampton CV-05-012059-00, 07-CV-337490PD2

Counsel: Robert T. Malen for DiBattista*Gambin Developments Limited
Alistair Riswick for Tas-Mari Inc., Domenic Tassone and Ottavio Tassone
Brett D. Moldaver for Ballantry Homes (Fletcher's Meadow) Inc., Devonlea Estates Inc., David Hill, Atul Vanmali, Bobby Bhoola

***Gray J.*:**

1 Real estate development is important in our economy. It is governed, in part, by agreements among municipalities, developers, builders, contractors and sub-contractors.

2 For the most part, arrangements of this sort proceed relatively smoothly. Agreements are reached, subdivisions are laid out, basic services are constructed, houses are built, builders are paid, people move in, the subdivisions are assumed by the municipalities, and everyone moves on.

3 In this case, things did not go smoothly. The relationship between a developer and some builders broke down and lawsuits ensued.

Background

4 The actions before me, which were tried together, involve two subdivisions in Brampton: Northview Downs and Cookfield. DiBattista*Gambin Developments Limited (hereafter "DBG") was the developer of both subdivisions. After

acquiring the land, DBG entered into subdivision agreements with the City of Brampton and the Regional Municipality of Peel.

5 After entering into a subdivision agreement, a developer will typically enter into agreements with one or more builders, unless the developer intends to do the building itself. In this case, DBG entered into agreements of purchase and sale with a number of builders. Three of those are relevant here. Some of the other agreements were the subject of litigation, but those proceedings were settled. The agreements of purchase and sale that are relevant in the cases before me are:

(a) agreement between Cookfield Developments Limited and Ballantry Homes (Fletcher's Meadow) Inc. with respect to 166 lots within the Cookfield subdivision;

(b) agreement between Northview Downs Development Limited and Devonlea Estates Inc. with respect to 228 lots within the Northview Downs subdivision; and

(c) agreement between Northview Downs Development Limited and 14475934 Ontario Limited (subsequently Tas-Mari Inc.), with respect to 174 lots within the Northview Downs subdivision.

6 It should be noted that Northview Downs Development Limited and Cookfield Developments Limited are wholly-owned subsidiaries of DiBattista*Gambin Developments Limited. Ballantry Homes (Fletcher's Meadow) Inc. and Devonlea Estates Inc. are single-purpose corporations. The shares are owned, for the most part, by David Hill, members of his family, and certain associates of his, including Atul Vanmali and Bobby Bhoola. Tas-Mari Inc. is also a single-purpose corporation, whose shares are owned, for the most part, by Domenic Tassone and Ottavio Tassone.

7 All three of the agreements of purchase and sale are, in their essential elements, identical.

8 The first of the agreements was negotiated directly between David Hill and Raymond DiBattista, one of the principals of DBG. Both Mr. Hill and Mr. DiBattista testified that the negotiations were conducted over a two or three-day period. Mr. DiBattista testified that it was important for him that the agreement accurately reflect the intentions of the parties, and specifically his intention. Thus, he testified, every word of the agreement was examined in detail before it was agreed to.

9 Once the first agreement was negotiated, it became the prototype for the others. Thus, both of the Ballantry Homes and Devonlea Estates agreements, which, for convenience, I will refer to as the "Hill" agreements, are identical.

10 The Tas-Mari agreement was executed after the Hill agreements had been negotiated. The principal negotiator for Tas-Mari was Domenic Tassone. He testified that he attempted to secure some amendments from Mr. DiBattista, but Mr. DiBattista was unwilling to agree to any. Thus, in the end, he signed an agreement that was more or less identical to the Hill agreements.

11 As a backdrop to the agreements of purchase and sale, DBG, through its subsidiaries, had signed subdivision agreements with the City of Brampton and the Regional Municipality of Peel. Those subdivision agreements contain detailed requirements which the developer must observe in the course of seeing the subdivision through to completion. Included are the requirement to properly grade the lands; to provide a storm sewer and drainage system; to provide a sanitary sewer drainage system; to provide a potable water system; to complete all necessary roads, including curbs, and boulevard grading, sodding, tree planting and landscaping; all improvements to abutting regional roads; driveway paving; noise attenuation works; street signs and traffic control signals; and sidewalks. To the extent that any of these requirements are passed on by the developer to the builder, through the agreements of purchase and sale, the developer nevertheless remains liable to the municipality to see that they are done properly.

12 DBG entered into an agreement with Niran Construction Ltd. as the general contractor. (Niran was subsequently replaced as general contractor, for reasons unrelated to this case.) Schaeffers Consulting Engineers were retained as engineers for the project.

13 As noted, all of the agreements of purchase and sale between DBG and the builders are identical. Certain of their terms are relevant to the issues in this case, and, while they are lengthy, I will reproduce them here, with certain provisions highlighted for emphasis:

> 6.01 Services, Development Charges and Levies: The Vendor shall, as soon as reasonably possible and either before or after the Closing Date, and at its expense:
>
> > (a) Services Install the services within the road allowance fronting or flanking the Lots as required by the Municipality under the provisions of the servicing agreements or financial agreement and the Hydro servicing agreement or other agreements entered or to be entered into between the Vendor and the Municipality or any other relevant government authority or utility commission or corporation (such agreements are herein collectively called the "Subdivision Agreement"), including without limitation, paved roads, 2-stage curbs, gutters, street lighting, street signs, walkways, sanitary and storm sewers, watermains, including all laterals to the lot lines, and cause to be installed underground hydro service, gas service and telephone to the lot line. The Purchaser agrees that all internal servicing within the boundaries of the Lots (including without limitation any lateral connections within the lot line) is the responsibility of the Purchaser. The Vendor shall complete the installation of base curbs and gutters and street lighting before occupancy of any building to be erected by the Purchaser unless earlier required for building permit available. The Vendor's obligations pursuant to this sub-paragraph are subject to the specific obligations of the Purchaser as provided for in this Agreement. The Purchaser hereby acknowledges that it must make arrangements with the local Hydro-Electric Commission for the supply and installation of underground electrical services within the lot line, from the services installed by the Vendor to the Purchaser's delivery point and the details of, and charges for, such electrical services shall be according to Commission standards, policies and procedures, as well as the Commission's regulations respecting electrical equipment, conditions of service and supply of electrical energy.
>
> . . . . .
>
> 6.07 Closing Inspection: Forthwith after the Closing Date, and prior to commencement of construction operations by the Purchaser on those Lots for which a Closing Date has been established, the Purchaser and the Vendor mutually agree to cause their respective representative to attend at the lots to inspect any subdivision services installed by the Vendor and to compile, in duplicate, a detailed list of all existing damages or defects in or to the subdivision services, including missing survey stakes and buried water boxes and keys. Such compiled list of damages shall be signed on behalf of both the Vendor and the Purchaser, and the Purchaser shall not be held responsible for the cost of repair, rectification or replacement of such noted existing damages or defects, and the Vendor shall not apply any portion of the security deposit paid by the Purchaser pursuant to this Agreement in respect of the repair, rectification or replacement of any such existing damages to subdivision services.
>
> . . . . .
>
> 9.01 The Purchaser covenants and agrees with the Vendor and acknowledges the following:
>
> . . . . .
>
> > (d) Comply with Subdivision Agreement: The Purchaser shall:
> >
> > > (i) observe and perform all requirements, notices and covenants contained in the Subdivision Agreement affecting the Lots;
> > >
> > > (ii) observe and perform all requirements, notices and covenants contained in the Subdivision Agreement affecting the other lands in the Subdivision (including streets, blocks, boulevards, parks, 0.3 metre reserves, road widenings, other public lands, etc.) as required pursuant to the terms of this Agreement.

(e) Internal Servicing: In the event the Vendor installs any services inside any Lot or if it is necessary to avoid disruption or damage to road, curb or sidewalks, the Vendor may install services or laterals to up to six feet (6') within any Lot. If relocation of any curbs, utilities or other services are required due to the location of any driveway, the cost of such relocation shall be paid by the Purchaser to the Vendor provided that such services are installed in accordance with the approved engineering plans originally delivered to the Purchaser.

(f) External Servicing: The Purchaser shall be responsible to install and complete the following services, in a manner satisfactory to the Vendor and the Municipality, outside the boundaries of the Lots, at the Purchaser's expense:

(i) Grading and sodding of boulevards and flankage;

(ii) Maintenance and removal of siltation fences at the appropriate times;

(iii) Any other matter which is a Purchaser's obligation under this Agreement and required by the Subdivision Agreement.

. . . . .

(l) Water Boxes: That upon completion of sodding operations, it will ensure that the water box is vertical to grade and in an operating condition, satisfactory to the Municipality. Where the water box or water valve is located in the driveway, a concrete pad 12 inches square shall be installed at finished grade surrounding the water box or valve by the Purchaser at its expense, if required by the Municipality. The Purchaser shall be responsible for any damage to water boxes no matter how caused and shall indemnify the Vendor in respect thereof (except for those buried water boxes identified in the inspection pursuant to Section 6.07 hereof so long as such water boxes remain uncorrected by the Vendor):

. . . . .

(n) Lots Kept Neat and Tidy: The Purchaser shall keep the Lots in a reasonably neat and tidy condition during the course of construction of any building thereon and shall comply with any reasonable requests made by the Vendor or any applicable authority in respect of the appearance of any of the same during construction and thereafter; and the Purchaser will not damage, litter or leave debris on other lands in the Subdivision (including streets, blocks, boulevards, parks, 0.3 metre reserves, road widenings, other public lands, etc.):

. . . . .

(p) Use of Roads: The Purchaser shall abide by the conditions of the Municipality with respect to the use of roads and the supply and delivery of materials, and the Purchase[r] shall not use, nor permit its agents, servants, employees, contractors or persons for whom it is in law responsible to use roads within the Subdivision Plan in a manner which would interfere or cause disruption to road construction or the general installation of the services of any other construction on the Lands within the Subdivision. The Purchaser shall arrange at its expense for all street cleaning as required by the Municipality from time to time, and in default thereof the Purchaser shall pay to the Vendor within 5 days of receipt of invoice, the Purchaser's share of the costs of cleaning all streets in the subdivision; such share shall be determined by the Vendor's Engineer in writing but if the Vendor's Engineer is unable to so determine, such share shall be the proportion which the total number of Lots covered by this Agreement bears to the total number of lots within the Subdivision Plan, together with an administration fee of 20% thereon, and any amount unpaid may be added to the VTB Mortgage and recovered thereunder;

(q) Non-Interference with Services: The Purchaser shall not interfere with the installation b the Vendor of services and without limiting the generality of the foregoing, shall keep the total road allowance, including he boulevards in front of or flanking the Lots and/or any easements on, over or under the Lots, at all times, free from any and all building materials, fill from excavations and/or construction equipment, so as not to obstruct or permit the obstruction in any way of the installation of curbs, streets, municipal and utility services, emergency vehicle passage, landscaping or other use thereof. The Purchaser shall not interferer with the staking

of the Lots. After the Closing Date the Vendor shall not be required to replace or relocate staking except where stakes were missing prior to the Purchaser's entry on the lots in question. If it shall be necessary of the Vendor to clean the roadways by reason of non-compliance by the purchaser with this covenant, the cost of such cleaning shall be borne by the Purchaser and paid to the Vendor forthwith upon demand together with an administration fee of 20% thereon, and any amount unpaid may be added to the VTB Mortgage and recovered thereunder.

. . . . .

(hh) Other Fences: The Purchaser shall be responsible to install, erect, maintain and repair all wooden screen fences abutting or along any of the Lots as required by the Subdivision Agreement, and whether inside or no more than 6 inches outside any Lot line. If any such screen fences divide any Lot from another lot not being purchased by the Purchaser, such responsibility shall be shared equitably. The Vendor shall install any acoustic fencing, chain link fences and siltation fences, but the Purchaser will maintain and remove at the appropriate time any siltation fencing, and the Purchaser agrees to pay the cost of installing any chain link fencing for Lots backing or flanking onto or across the street on any single loaded road (being a road with residential units on one side only) from open space to the Vendor forthwith upon demand, and any amount unpaid may be added to the VTB Mortgage and recovered thereunder.

ARTICLE 10 INDEMNITY

10.01 Meanings - Related Party/Services/Damage: For the purpose of Articles 10 and 11, the following words and expressions shall have the meanings indicated below:

(a) "Related Party" shall include any employee, servant, agent, independent agent, contractor, sub-contractor of the Purchaser, or any successor in title to the Lots or any successor to the beneficial interest in any of the Lots or any of the respective heirs, executors, administrators, successors and assigns of the Purchaser, or any invitee of any of the aforementioned persons;

(b) "Services" shall include any services installed or to be installed within the Lots or within the lands comprising the Subdivision Plan by the Vendor or any other person or persons including the Municipality of any other authority, including, expressly without limiting the generality of the foregoing, survey stakes and iron bars, landscaping, tree planting, grading, sodding, curbs, curb cuts, streets, temporary or permanent roads and all components thereof, sidewalks, walkways, street signs, street lighting, sanitary and storm sewers (including lateral connections), watermains (including lateral connections) drainage, facilities and ditches and all appurtenances relating to any of he foregoing services, any hydro service, gas service, telephone transmission lines, or any other installations effected for the purpose of public or private utilities.

(c) "Damage" shall include the cost of rectifying the damage; the total cost incurred or to be incurred in connection with replacing, relocating, rectifying or repairing any of the Services or incurred or to be incurred in connection with the refilling, removing, rectifying and re-grading of any land within the Subdivision Plan or roads or other services where dirt, debris, earth or any foreign material has been deposited thereon, and all incidental soft costs such as engineering, consulting and legal fees; damage shall also include all damages flowing from any failure of the Purchaser to perform any of the Purchaser's obligations contained in Article 9 (or to refrain from performing those which it is obligated to refrain from), and the total cost incurred or to be incurred in connection with performing such obligations on the Purchaser's behalf, plus an administration fee of 20% thereon.

10.02 Indemnity: The Purchaser shall indemnity and save harmless the Vendor from and against:

(a) Any Damage caused by the Purchaser or any Related Party with respect to the Services and with respect to any matter or thing whatsoever within the Subdivision Plan; and

(b) All claims, demands, proceedings, actions, damages, costs and expenses, including legal costs, fees and disbursements which may be made or brought against the Vendor howsoever or which it may sustain, incur or be put to howsoever, either directly or indirectly, as a result of anything done or omitted to be done by the Purchaser or by any Related Party.

It is understood and agreed that in respect of any Damage to the Services, or any claims, demands, actions or proceedings which may be made, or brought against the Vendor by any owner of other lands in the Subdivision Plan or contiguous thereto, the Purchaser shall indemnify and save harmless the Vendor in respect thereof with respect to Damages caused by the Purchaser or any Related Party.

. . . . .

10.04 Determination of Damage: Prior to the Closing Date, the Vendor and purchaser or their respective agents shall meet for the purpose of conducting an inspection of the state of repair of all Services including without limitation survey iron bars. A list of all deficiencies then existing and visible or otherwise discernible shall be prepared, which existing deficiencies shall be the responsibility of the Vendor. If the Vendor and Purchaser or their respective agents are unable to meet, the Vendor's consulting engineer shall prepare a list of deficiencies which list shall be binding on all parties. The Purchaser further agrees to remedy and rectify all damage to curbs, services, sidewalks, etc. that may be caused by the Purchaser or a Related Party or by its building operations. Where Damage has occurred and it appears that such Damage may have been caused by or is attributable to other builders in the Subdivision (if any) shall be determined by the consulting engineer.

The amount of Damage caused by or attributable to the Purchaser or any Related Party to the Services (or the allocation of responsibility therefore among the Purchaser and other builders, if any, where it appears that such Damage may have been by or is attributable to other builders) shall be determined by the consulting engineer of the Vendor from time to time and at the date upon which the Municipality certifies in writing its final acceptance of the Services pursuant to the Subdivision Agreement and/or at any date or dates prior or subsequent thereto and the decision of such consulting engineer acting in accordance with generally acceptable engineering practice shall be final and binding upon the parties hereto and the determination of such consulting engineer shall be made by him alone and he shall not be obligated to act as an arbitrator in connection therewith nor shall any of the rules normally applicable to arbitrators apply to the determination of such consulting engineer.

10.05 Consulting Engineer: Whenever the term "consulting engineer" or "Vendor's Engineer" issued in this Agreement, it shall mean the engineer retained from time to time by the Vendor, provided such engineer shall be a professional engineer qualified to practice in Ontario and dealing at arm's length to the Vendor.

ARTICLE 11 SECURITY DEPOSITS

11.01 Security Deposit: In addition to any other sums to be paid to the Vendor, the Purchaser shall pay to the Vendor on the Closing Date, Two Thousand Dollars ($2,000.00), (herein called the "Security Deposit") for each Unit or the sum of $100,000.00, whichever is less. The Security Deposit shall be held as a deposit on account of the indemnity given by the Purchaser referred to in Article 10 and on account of the Purchaser's obligations under this Agreement. The Security Deposit may be paid by an unconditional and irrevocable Letter of Credit issued by a Canadian chartered bank in a form acceptable to the Vendor, acting reasonably. Such Letter of Credit to be automatically renewed at least thirty (30) days prior to its expiry from time to time, otherwise the proceeds thereof may be demanded by the Vendor. Such Letter of Credit may be drawn upon by simple certificate addressed to the Bank, by an officer of the Vendor certifying entitlement to draw upon the Letter of Credit, and the Bank shall not be obligated or entitled to make any inquiries as to the right of the Vendor to draw upon the Letter of Credit. The Security Deposit shall be provided, at the Vendor's option, to either the Vendor or its serving lender and shall be stated to be transferable to the Vendor's servicing lender.

11.02 Damage: The Vendor shall be entitled to deduct from the Security Deposit from time to time, any amount or amounts on account of any Damage to the Services as determined in accordance with Article 10 or any failure to perform any of the Purchaser's obligations under this Agreement. It is understood and agreed that the Purchaser's liability for any Damage is not limited to the amount of such Deposit(s) and in the event that the Damage or the default by the Purchaser and the quantum assessed by the Vendor's consulting engineer shall be in excess of the amount of the Security Deposit(s) then held by the Vendor, the Purchaser shall forthwith upon being notified of the amount of such Damage or default and the amount over and above the amount then held on account of the Deposit(s), pay the amount of such excess to the Vendor by certified cheque and in the event that the balance of the Deposit(s) being held by the Vendor is at any time less than 100% of the amounts provided for in Section 11.01, the Purchaser shall forthwith upon demand pay to the Vendor the sum required or increase the Letter of Credit to reinstate the Deposit(s) to such amount. Wherever in this Article reference is made to deducting any amounts from the Deposit(s), such reference shall include the making of any draw upon any Letter of Credit provided by the Purchaser.

11.03 Deduction for Damage: The Vendor shall be entitled from time to time to deduct an amount required to rectify any Damage to Services as certified by its engineer from the Security Deposit on account of any Damage to the Services caused by the Purchaser or Related Party or assumed pursuant to this Agreement, as well as an account of any breach or breaches by the Purchaser of any of the other covenants or provisions contained in this Agreement.

11.04 Return of Deposits: Subject to the provision of Articles 9, 10 and 11, the Security Deposit or the balance thereof remaining with respect to each building lot or block shall be returned to the Purchaser:

(a) as to 50% thereof, 30 days after the Vendor's engineer has certified that the sodding and final grading for each and every one of the Units purchased has been completed in accordance with the provisions of this Agreement. The Vendor's engineer to attend for this purpose within 10 days of Purchaser advising Vendor that lot(s) are ready; and

(b) as to the remaining 50% thereof, 30 days following the date upon which the Municipality certifies in writing its final acceptance of the Services pursuant to the Subdivision Agreement.

11.05 Notice: In no event shall the Vendor, at the Purchaser's expense, repair any damage or draw upon the Security Deposit, prior to providing to the Purchaser written notice specifying the Damage or Default complained of and allowing seven (7) days for the Purchaser to remedy such default or repair the damage or commence and diligently undertake repair of the damage or a cure of such default within a reasonable time as determined by the Vendor but not exceeding 15 days from delivery of the written notice thereof by the Vendor, subject to force majeure, i.e. if the Purchaser is delayed, hindered in or prevented from the performance of any obligation by reason of fire, storm, flood, earthquake, explosion, accidents, strikes, labour disputes, acts of God, acts or regulations or priorities of any governmental authority, to the extent the same are beyond the control of the Purchaser, then performance of any such obligation shall be extended for a period equivalent to the period of such delay, except that lack of funds or financial difficulty shall not under any circumstances be grounds for any excuse or delay.

[emphasis added]

14 Certain of these provisions require some comment.

15 Mr. DiBattista testified that he wanted the aggregate security deposits, to be provided by the builders, to be considerably higher. However, he said that during the negotiations he was assured by Mr. Hill that all payments for which he was invoiced would be paid promptly, and that a considerably smaller security deposit, in total, would be appropriate. Ultimately, Mr. DiBattista was persuaded that he could live with a smaller security deposit, in the aggregate, and accordingly he agreed to a $100,000 security deposit, in the aggregate, by each of Ballantry and Devonlea, and a $200,000 security deposit, in the aggregate, by Tas-Mari.

16 Mr. DiBattista also testified that because there was more than one builder working in each subdivision, he wanted a mechanism to ensure that the builders would not blame each other when the time came to pay for items for which the builders would be invoiced. The agreements of purchase and sale contain a number of provisions that allow the developer to correct deficiencies or damage, and then allow the developer to chargeback the relevant amounts to the builders. Mr. DiBattista testified that it is not uncommon, in his experience, for builders to disclaim responsibility and blame each other when they are invoiced. Accordingly, he wanted it to be made clear that the developer's engineer would allocate responsibility among the various builders, and that there would be no dispute about the allocation. Mr. DiBattista testified that he recognized that this sort of arrangement can be somewhat arbitrary, and perhaps unfair, but that as a matter of business efficacy, it is the only way it can work.

17 Mr. DiBattista also testified as to his understanding of the effect of Article 11.05, which requires that notice to be given to the builder, and an opportunity to be given to the builder to remedy a default or repair damage, before the builder can be held responsible. In Mr. DiBattista's view, this provision applies only to deficiencies inside the lot lines of the specific lots purchased by the builder. It does not apply, in his view, to damage caused by the builder to general services within the subdivision that are outside the lot lines. In that circumstance, in his view, the builder can be charged without any notice or an opportunity being given to repair the damage. If it were otherwise, according to Mr. DiBattista, the integrity of the general services could be impaired. They had been installed by a single contractor, approved by the municipality, and it would be important that any repairs be effected by the same contractor, for reasons of quality, uniformity, and maintenance of warranty coverage.

18 It should also be noted that while Ballantry and Devonlea are separate corporate entities, and executed separate agreements of purchase and sale, each calling for a total security deposit of $100,000, it is clear from the evidence that DBG regarded the security deposit as being one amount of $200,000, and felt free to call upon the entire amount for alleged defaults that occurred with respect to either agreement.

19 In each case, the security deposit was provided for by the furnishing, by each builder, of a letter of credit in the required amount. Each letter of credit was unconditional, in the sense that DBG was entitled to demand, from the financial institution supplying the letter of credit, that payment or payments be made pursuant to the letter of credit, and that approval by the builder would not be required or sought.

20 Ultimately, DBG invoiced the builders for various amounts, purportedly under the agreements of purchase and sale. Some of these amounts were for damage, allegedly caused by the builder, for which DBG took the position that it could hold them liable pursuant to Article 10. In some cases, they were for items for which DBG took the position it could hold them liable under Article 9, such as for fencing or trees. Eventually, DBG drew on the security deposits when the builders refused to pay. This litigation ensued.

21 As noted, things did not go smoothly as between DBG and the builders. I will start with Tas-Mari.

Tas-Mari

22 Tas-Mari's agreement of purchase and sale was executed on December 20, 2001. Effectively, the houses were pre-sold before construction began. Construction began in March, 2003. Closings for almost all of the homes were completed by December, 2003. Four were completed between January and March, 2004.

23 During construction and thereafter, DBG invoiced Tas-Mari on a number of occasions. Those invoices total $184,928.84.

24 From April, 2003 to July, 2005, Tas-Mari paid invoices totalling $84,928.05. Pursuant to Article 11.04 of the Agreement, Tas-Mari sought reduction of the security deposit by 50%. After some discussion about some outstanding invoices, DBG reduced the letter of credit to $100,000. That reduction was made on July 28, 2005.

25 The invoices that had been paid by July, 2005 were of several different kinds. There was an invoice from the City of Brampton in the amount of $10,000 for the repair of Creditview Road, which is outside the subdivision. The City wanted a contribution apparently arising out of increased use of Creditview Road because of subdivision construction. An assessment was made by Schaeffers among the various builders and Tas-Mari paid its share. Another invoice related to the cleaning of Sandalwood Parkway. An invoice was rendered relating to the cleaning of the subdivision. Tas-Mari was invoiced for a rear-lot catch basin and some signs. Another invoice related to the cleaning of catch basins generally in the subdivision. An allocation was made by Schaeffers. There were invoices for a cleanup at mailbox pads; landscaping and fencing; and repairs of broken base curbs and stirrups for sidewalks. As noted, these invoices totalled $84,928.05.

26 It should be noted that no notice was given by DBG before any of the work was done that is reflected in these invoices, and Tas-Mari paid the invoices regardless. Even though some complaint was made about some of the invoices, none of the complaints involved lack of notice. An invoice for landscaping and fencing was reduced by $6,500 after discussion, but no mention was made about lack of notice.

27 After the letter of credit was reduced from $200,000 to $100,000, DBG sent a considerable number of additional invoices to Tas-Mari, from July, 2005 to October, 2008. The entire balance of $100,000 in the letter of credit was drawn by DBG in two instalments, on November 8, 2005 and May 31, 2006, leaving a balance claimed by DBG of $85,598.84. DBG also claims that Tas-Mari must reinstate the letter of credit, in the amount of $100,000. For its part, Tas-Mari claims that the letter of credit was improperly drawn, and claims its restoration by DBG.

28 The unpaid invoices are for a number of different things, and require some brief analysis:

(a) July 18, 2005 - $2,657.75; this related to removal of garbage and regrading of a boulevard. It is claimed that Tas-Mari stored garbage and building materials on the site, and DBG had to clean it up.

(b) July 25, 2005 - $45,241.38; this related mainly to removal and replacement of damaged concrete, in preparation for top asphalt for roads. An inspection was done and an allocation was made by the engineer, Schaeffers. Tas-Mari was notified of the inspection, but did not attend. In a somewhat cryptic letter, dated September 1, 2005, Tas-Mari raised the issue of notice, and stated that Tas-Mari should have had some notice to "access" the damage. Nothing was said about Tas-Mari having an opportunity to itself repair any damage.

(c) August 29, 2005 - $2,100; this relates to surveying work for fencing.

(d) October 31, 2005 - $9,403.66; this invoice relates to past charges for administration and engineering fees.

(e) April 21, 2006 - $4,844.93; this relates to concrete repair work that had been done in 2003. In October, 2003, Tas-Mari had requested work for curbs and sidewalks in its area of construction.

(f) May 25, 2006 - $59,399.88; this relates to work done in July to December, 2005. It relates to removal of garbage, repair of water main facilities, removal and replacement of damaged base asphalt, cleaning/sweeping of road debris and flushing/cleaning and removal of mortar in sewers. An assessment was made by Schaeffers and an allocation to the builders was made by Schaeffers.

(g) November 16, 2007 - $5,739.30; this relates to street lighting and transformer repairs. Hydro One Brampton requires that transformers be brought up to standard. A Hydro One inspector performs the inspection, and an electrical consulting engineer determines how much the builders pay. An inspection is also done of light poles, and those that require straightening are straightened. Once again, the builders are invoiced. None of the builders were given notice of this inspection or the work.

(h) November 19, 2007 - $3,483.37; this relates to sweeping of the subdivision and cleaning out of catch basins. Schaeffers supervised and inspected the work and an allocation was made among the builders.

(i) July 8, 2008 - $7,691.78; this relates to sidewalk repair work. Tas-Mari, through its solicitor, was informed of the results of the inspection before the work was done. Tas-Mari did not indicate that it wished to do the work itself.

(j) July 9, 2008 - $887.25; this relates to pole straightening. Once again, this is required by Hydro One Brampton. The electrical consulting engineer determined which builder or builders were responsible for the particular pole or poles.

(k) September 16, 2008 - $28,790.04; this relates to the cleaning of the storm water management pond. The pond collects storm water from a number of subdivisions. Before assumption of the subdivision, it is necessary to clean the pond. Schaeffers allocated responsibility to the builders. Notice was provided under Article 11.05 through counsel, without prejudice to DBG's position that notice was not required.

(l) October 24, 2008 - $4,851.63; this relates to installation of survey monumentation. The surveyor determined which survey points were missing, and the developer allocated the charges.

I am satisfied that all of the work reflected in these invoices was, in fact, performed, and that the amounts claimed are reasonable. For reasons articulated later, the claim for cleaning the storm water management pond is not maintainable.

Ballantry

29 Ballantry paid a number of invoices to DBG, totalling $102,548.21. These were for a variety of things, including repair of base curbs and stirrups, fencing, street cleaning, landscaping (including surveying) repair of electrical service, repair of street signs.

30 The unpaid invoices, some of which were paid by a call on the letter of credit, are as follows:

(a) June 28, 2005 - $5,370.65; this invoice related to the straightening of poles and painting transformers. An assessment was done by the consulting electrical engineers. No notice was given.

(b) November 9, 2005 - $6,420; this invoice related to cleanup of fill placed on lands owned by Trans Canada Pipeline. These lands are contiguous to the subdivision. No notice was given. Mr. Hill disputes that Ballantry was responsible.

(c) January 5, 2006 - $3,816; this invoice relates to the replacement of missing survey bars. The amount claimed had been invoiced by the surveyor. No notice was given. It is claimed that Mr. Hill agreed to pay this invoice.

(d) April 3, 2006 - $78,833.65; this repair invoice relates to broken base curbs, stirrups, top curb and sidewalk. An assessment was done by Schaeffers. No notice was given. It is claimed that Mr. Hill agreed to pay this item, except for the 20% administration fee.

31 The total amount claimed, for invoices remaining unpaid, is $74,758.55. DBG also requests an order that the security deposit of $50,000 be restored. I am satisfied that the work reflected in these invoices was, in fact, performed, and that the amounts claimed are reasonable.

Devonlea

32 A number of invoices were paid, in the total amount of $21,799. They were for a number of matters, including the repair of Creditview Road (referenced in connection with Tas-Mari, *supra*), repair of a rear lot catch basin, at the request of Devonlea, cleaning of Sandalwood, road cleaning, repair of services and repair of electrical services.

33 The following invoices were unpaid, most of which were ultimately paid by a call on the letter of credit:

(a) November 3, 2004 - $19,316.46; this relates to a broken lead from a catch basin. Devonlea requested that the developer investigate a flooding situation, and the need for the repair was discovered.

(b) March 28, 2005 - $3,490.39; this invoice relates to the repair of base curbs, stirrups, damaged street signs, and the flushing and videotaping of the rear lot catch basin that was repaired as referred to in (a), above. No notice was given.

(c) April 6, 2005 - $609.13; this invoice relates to the cleanup around mailbox pads, apparently because residents left items there. No notice was given.

(d) April 19, 2005 - $100,910.10; this invoice relates to landscaping and fencing. It is not a repair invoice. No notice was given.

(e) July 18, 2005 - $4,935.82; this invoice relates to the cleanup of the boulevard at Creditview, as referenced in the discussion about Tas-Mari, *supra*. No notice was given.

(f) July 25, 2005 - $48,555.44; this invoice relates to the preparation of roads for top asphalt. The builders were notified that this work would be done. No other formal notice was given. An allocation was made by Schaeffers.

(g) August 25, 2005 - $2,500; this relates to surveying for fencing.

(h) April 21, 2006 - $1,393.16; this relates to repair of base curbs and stirrups in 2003. No notice was given.

(i) April 21, 2006 - $2,611.60; this relates to repair work done in 2003. An assessment was done by Schaeffers. No notice was given.

(j) May 10, 2006 - $2,947.07; this relates to the cleaning of a catch basin and replacement of a broken catch basin cover. The work was done in 2003. An assessment was done by Schaeffers. No notice was given.

(k) May 25, 2006 - $78,756.46; this relates to repair of water mains, repair of base asphalt, and flushing of mortar. No notice was given. An assessment was done by Schaeffers.

(l) November 16, 2007 - $8,736.52; this relates to pole straightening and transformer painting. No notice was given. The electrical consultant did an assessment.

(m) September 19, 2007 - $4,458.72; this relates to subdivision sweeping and catch basin cleanout. There is an issue as to whether notice was given.

(n) July 8, 2008 - $11,479.65; this relates to curb and other repairs, as a result of an inspection by the City of Brampton and Schaeffers in connection with deficiencies following an earlier repair. Notice had been provided on a without prejudice basis.

(o) July 9, 2008 - $859.95; this relates to street light pole straightening and transformer repairs. No notice was given. An assessment was done by the electrical consultant.

(p) September 16, 2008 - $51,494.47; this relates to the cleaning of the storm water management pond, as referred to in the discussion regarding Tas-Mari, *supra*. Notice under Article 11.05 had been provided by letter from counsel, as noted earlier.

(q) October 23, 2008 - $9,132.48; this relates to reinstallation of missing survey documentation. No notice was given.

(r) October 23, 2008 - $441; this relates to the repair of water boxes.

34 The total amount claimed, for invoices remaining unpaid, is $172,311.09. DBG requests an order requiring the restoration of the letter of credit, of $50,000.

35 As noted earlier, DBG took the position that the total of the letters of credit for both Ballantry and Devonlea, in the aggregate amount of $200,000, could be drawn upon for alleged deficiencies on the part of either or both builders, notwithstanding that they are separate corporate entities, and had separate agreements with DBG. Indeed, both letters of credit, in the total amount of $200,000, were drawn in their entirety, $19,682.65 in respect to Ballantry, and $180,317.35 in respect to Devonlea. I am satisfied that the work reflected in these invoices was, in fact, performed and that the amounts claimed are reasonable. As noted earlier, the claim for cleaning the storm water management pond is not maintainable.

Observations on the Evidence Given by the Parties

36 As is to be expected, the evidence diverged. Except for one witness, about which I will say more, all of the witnesses testified in a forthright manner, without intending to mislead the Court. For the most part, the divergences in the testimony can be explained by the passage of time, and by the natural tendency to view the issues in dispute through the lens of self-interest.

37 I cannot say the same for Mr. Hill. He was an unsatisfactory witness. He was evasive, and his evidence changed at trial from some of his evidence given on discovery. Sometimes, his evidence changed while he was in the witness box.

38 DBG called five witnesses.

39 Raymond DiBattista is the president of DBG. His main responsibility relates to office duties. He negotiated the agreements of purchase and sale, and was generally responsible for invoicing. He attended the work sites from time to time. Having observed and listened to Mr. DiBattista, there is no doubt that he knows his way around the construction business. He was frank to acknowledge in his evidence before me that he "always plays hardball". By this, I take it he means that he will squeeze every penny out of the agreements that he negotiates. He is not above using economic leverage to squeeze as much as he can.

40 Lou Gambin is the secretary-treasurer of DBG. His work is primarily to be the on-site presence at the subdivisions. He had most of the direct dealings with the builders onsite, and with Schaeffers, the consulting engineers, and others.

41 Levon Fermanian is now a professional engineer. He attained that designation in 2004. He began working at Schaeffers in 1989, and he worked on both subdivisions. He was the person who did most of the back-charge assessments, in consultation with his superior, Vijay Gupta, a consulting engineer.

42 Henry Marfisi is an engineering technologist, employed by RTG Systems Corp., the electrical consulting engineers. He testified as to the work that was done on street lighting and transformers.

43 James Stewart was called as an expert witness. He testified as to the general practice in the construction industry in some respects, particularly as to the doing of repairs on general services, such as sewers, water mains, roads and sidewalks. His evidence was that such work is generally performed by the contractor who installed the services in the first place, and that, in his experience, such work has never been performed by individual builders.

44 Domenic Tassone was the only witness called on behalf of Tas-Mari. In substance, he testified that he should have had notice of what work or repairs were going to be done for which Tas-Mari would be charged. If he had had such notice, he could have decided whether he could arrange to have the repairs or other work done more cheaply, and could have saved the developer's 20% administration fee. However, he acknowledged on cross-examination that he had paid a number of invoices without apprising DBG that that was his position, and indeed he did not formally take that position until he had retained counsel. While he did not agree with a number of the invoices that he did pay, he testified that he paid them because DBG took the position that it would not reduce his letter of credit by 50% until the invoices were paid. While Tas-Mari was finished with all of its work in its subdivision early in 2004, Mr. Tassone objected to being invoiced for some considerable period after that. He acknowledged, however, that the responsibility of the builder lasts until the subdivision is assumed by the municipality.

45 Mr. Tassone confirmed that the subdivision project was profitable for Tas-Mari, and that Tas-Mari earned a profit of approximately $3 million on the project.

46 David Hill was the only witness called on behalf of both Ballantry and Devonlea.

47 Mr. Hill confirmed that he personally negotiated the agreements of purchase and sale with Mr. DiBattista. He agreed that Mr. DiBattista originally wanted a security deposit, in the aggregate, much larger than what was ultimately agreed to. Mr. DiBattista wanted a security deposit of $2,000 per lot, without limit. Ultimately, they agreed to a cap of $100,000 for each of Ballantry and Devonlea, although he did not say there was any particular reason.

48 Mr. Hill testified that each project was profitable, profits being in the range of $5 million to $6 million on each project.

49 With respect to Article 11.05, Mr. Hill testified that he specifically discussed the need for notice with Mr. DiBattista. He said it was important that he be given an opportunity to assess any claimed damage for which he would be responsible, so that he would have an opportunity to fix it himself. He testified that Mr. DiBattista agreed with him on this point. He testified that if he were to do the work himself, or arrange for someone else to do it, he would save the 20% administration fee, plus the 10% engineering fee, and he might get the work done for a lower price. He testified that this is quite usual in agreements of purchase and sale that he has negotiated before, although he did not produce any as examples.

50 Mr. Hill reviewed the various invoices. In many cases, he took the position that he was not responsible to pay them because he had not received notice in advance. He acknowledged, however, that he had paid many invoices when notice had not been given, and it was not until he retained counsel that he took the position that notice was required before he could be required to pay.

51 Mr. Hill acknowledged that he had agreed, in certain correspondence with DBG, that he would pay some of the disputed invoices, but took the position that his offers to pay were in connection with proposals to resolve all outstanding matters, which were often joined with his proposal to waive the administration fee. He testified that those proposals were rejected by DBG, and accordingly the disputes were back on the table.

52 Mr. Hill acknowledged that both Ballantry and Devonlea are single-purpose corporations, set up only to be involved in the two subdivision projects at issue in this litigation. He acknowledged that all of the work on both subdivisions has been completed, and both corporations have no further revenues coming in. He also acknowledged that all of the profits of both corporations have been disbursed. Each corporation has virtually no assets to satisfy any judgment.

53 Mr. Hill testified, on cross-examination, that the shareholders of both corporations are himself, various members of his family, Mr. Vanmali, and Mr. Bhoola. The profits were distributed to the shareholders, members of his family, and various RRSPs. He took the position that all distributions were made at a time when DBG was not a creditor, and they were made in the ordinary course of business without any intent to defeat DBG's rights.

Submissions

54 Counsel for DBG submits that all of the invoices rendered to each of Tas-Mari, Ballantry and Devonlea were proper, and claims judgment for all outstanding invoices that have not been paid, as well as amounts required to restore the letters of credit. In the case of Tas-Mari, that amounts to $85,598.61. In the case of Ballantry, the amount is $74,758.55, and in the case of Devonlea, it is $172,311.09. DBG also seeks judgment against the directors of Ballantry and Devonlea, pursuant to s. 248 of the *Business Corporations Act*, as an oppression remedy. DBG does not seek an oppression remedy against Tas-Mari or its directors.

55 As noted, DBG also seeks an order that each of the builders reinstate its respective security deposit, Ballantry and Devonlea as to $50,000 each, and Tas-Mari as to $100,000.

56 Counsel for DBG submits that there was no requirement to give notice, or an opportunity to repair, to any of the builders before repairs were effected for which the builders are sought to be made liable. Counsel submits that, on a proper construction of Article 11.05 of the Agreement, no notice or an opportunity to repair was required for repairs to be done outside the lot lines of the properties purchased by the builders. Counsel submits that it would not be reasonable to construe that article in a manner that would allow a builder to perform repairs on general services that are not under the control of the builder. This would include sewers, water mains, sidewalks, curbs, stirrups, light poles and transformers. All of these works and services were put in by the general contractor or an electrical contractor, and are common to the entire subdivision. It would make no sense whatsoever if the repair work were done by anyone other than the contractor who put the works and services in in the first place. There would be issues as to warranty coverage, consistency and quality. Counsel also points out that the expert evidence called by DBG, to the effect that repairs to work and services of this sort are never performed by builders, and always by the contractor who installed them, was uncontradicted.

57 In the alternative, DBG argues that it is entitled to succeed on the basis of unjust enrichment, and/or that the builders are estopped by their conduct from disputing the validity of the impugned invoices. Mr. Malen argues that since DBG has paid for work that is the responsibility of the builders, they will be required, by a court of equity, to pay DBG the amount by which they have been unjustly enriched. Mr. Malen also argues that by paying invoices without raising the issue of lack of notice, the builders have induced DBG to believe that notice is unnecessary. Thus, he submits, the requisites of estoppel have been satisfied.

58 Counsel for DBG also points out that a number of the invoices, such as for fencing and water boxes, have nothing to do with repair, and would not require notice in any event. They are the direct responsibility of the builder under the agreements of purchase and sale.

59 Counsel for DBG submits that the developer was perfectly entitled to draw on the letters of credit in order to pay some of the outstanding invoices. Once the letters of credit were drawn upon, the builders had a clear obligation to restore those letters of credit to the required amounts, and they did not do so. Accordingly, orders should issue requiring those letters of credit to be restored.

60 With respect to the obligations of Ballantry and Devonlea, Mr. Malen submits that judgment should issue against the directors of both corporations personally. It is submitted that the directors stripped the assets out of the corporations when they knew that significant obligations remained to DBG. Mr. Malen submits that the requisites of s. 248 of the *Business Corporations Act* have been satisfied, and it is appropriate to issue personal judgments against the directors.

61 Counsel for Tas-Mari submits that DBG had no right to claim any of the amounts sought, because DBG did not comply with conditions set out in the agreements of purchase and sale. Accordingly, Mr. Riswick submits that DBG had no right to draw down the letter of credit, and has no right to pursue the additional amounts claimed in this action. Tas-Mari, accordingly, requests judgment in the amount of $100,000, which it will use to reinstate the letter of credit, to remain in place until the subdivision is assumed.

62 Tas-Mari submits that Article 11.05 of the agreement of purchase and sale sets out a clear precondition to the right of DBG to claim payment for expenses claimed in this action. Furthermore, Article 10, relied upon by DBG as the foundation for its claim, contains a number of conditions that must be satisfied before payment can be claimed. Those conditions have not been satisfied, and DBG's claim should be dismissed.

63 Counsel for Ballantry and Devonlea urges that I should arrive at the same result as that contended for by Tas-Mari. Thus, it is urged that Article 11.05 of the Agreement was not complied with, in that neither builder was given notice of any damage or default, nor was either builder given an opportunity to remedy the default or repair the damage. Accordingly, the amounts claimed, at least for matters covered by Article 11.05, cannot be recovered. Accordingly, it is submitted, DBG had no right to draw down the letters of credit.

64 Counsel submits that no waiver or estoppel arises on the facts of this case. The agreements themselves contain a "no-waiver" provision, and in any event, the requisites of waiver and/or estoppel have not been satisfied by DBG. He also argues that the builders have not been unjustly enriched on the facts of this case.

65 With respect to the personal claims against the directors of Ballantry and Devonlea, Mr. Moldaver submits that they should be dismissed. Counsel submits that the Court has a discretion under s. 248 of the *Business Corporation Act*, even if DBG can qualify as a "complainant" within the meaning of that section. It is submitted that DBG does not qualify as a complainant, because it was not a creditor at the relevant time. Even if it does so qualify, counsel submits that the Court should not exercise its discretion to make an order against the directors, because DBG at all times knew that it was dealing with limited liability corporations, and did not seek personal guarantees from the directors. The profits of the corporations were distributed in the ordinary course of business, and there is no evidence to suggest that any such distributions were made with the intent to defeat any rights of DBG. Accordingly, it is submitted, an order under s. 248 of the *Act* should not be made.

Analysis

66 It is necessary, first, to determine what the agreement of purchase and sale means. If, on a proper construction of the agreement, DBG was entitled to charge the builders for the amounts claimed, it must be concluded that DBG was entitled to draw on the letters of credit to satisfy at least some of the unpaid invoices. Thus, the first order of business is to construe the agreement.

67 A commercial agreement is not negotiated or concluded in a vacuum. It is written, and implemented, in the context of a matrix of surrounding circumstances, which may be relevant to its interpretation. Of necessity, the Court must be informed about the commercial circumstances under which a contract is made, in order to give context to the dispute. As Blair J.A. stated in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (Ont. C.A.), at para. 45:

> Contracts are not made in a vacuum, and there is no dispute that the surrounding circumstances in which a contract is negotiated are relevant considerations in interpreting contracts. As this court noted in *Kentucky Fried Chicken*, *supra*, at para. 25: "[w]hile the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance."

68 However, except in narrow circumstances, evidence of subjective intention is neither admissible nor helpful. Evidence of that sort denudes the written contract of its effect. Once reduced to writing, the parties are entitled to a high degree of certainty that its terms will govern. Furthermore, evidence of subjective intention will often conflict, as here, and it is not unusual that both parties will approach the negotiations with different intentions or expectations. As stated by Doherty J.A. in *Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.), at para. 50:

> In my view, when interpreting written contracts, at least in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. This is so for at least two reasons. First, emphasis on subjective intention denudes the contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve. This is particularly important where, as it often the case, strangers to the contract must rely on its terms. They have no way of discerning the actual intention of the parties, but must rely on the intent expressed in the written words. Second, many contractual disputes involve issues on which there is no common subjective intention between the parties. Quite simply, the answer to what the parties intended at the time they entered into the contract will often be that they never gave it a moment's thought until it became a problem: see Kim Lewison, *The Interpretation of Contracts*, 3rd ed (London: Sweet & Maxwell, 2004) at 18-31.

69 A commercial contract is to be interpreted as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective. An interpretation should be preferred that is in accordance with the language the parties have used in the document, and based upon the cardinal presumption that they have intended what they have said: see *Ventas Inc.*, *supra*, at para. 24; and *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, [2008] O.J. No. 1947 (Ont. C.A.), at para. 31.

70 Tas-Mari relies on the *contra proferentem* rule. In short, that rule requires that, where there is ambiguity in a written contract, it should be interpreted in a manner least favourable to its drafter. In my view, that rule has little, if any, application where commercial parties are of more or less equal bargaining strength, and where they have an opportunity to secure legal advice. Generally speaking, the rule applies to "take it or leave it" contracts, such as insurance contracts: see *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at p. 899. I do not think the rule has any application here.

71 As part of the backdrop to the negotiation of the agreements of purchase and sale, it was well understood that DBG would be subject to the terms of a subdivision agreement with the municipality. Under that agreement, the developer is responsible to the municipality to see that the subdivision is built in accordance with the municipality's requirements. If there is any default, the municipality will look to the developer, and not the individual builders, to rectify any deficiencies.

72 As part of the development of the subdivision, certain basic services must be provided. These will include water mains, storm and sanitary sewers, roads (including sidewalks and asphalt), stop signs, electrical services, including poles, lights and transformers.

73 These services are common to the entire subdivision, and common sense would suggest that, if any repair or rectification of those services is required, it should be done by one contractor, preferably the contractor who installed them in the first place. For the sake of consistency, if nothing else, it would make little sense that any such repair or rectification be done by a myriad of contractors selected and paid by individual builders. It is not difficult to see that quality control would be difficult, if not impossible, to maintain otherwise. Furthermore, warranty issues would undoubtedly arise.

74 In addition to a common sense view of the matter, the uncontradicted evidence of Mr. Stewart, the expert called by DBG, confirms that this is the general practice in the industry. Invariably, repair and rectification to common services is done by one contractor, preferably the contractor who installed the services in the first place.

75 In addition to the commercial backdrop to the agreement itself, in the case of ambiguity regard may sometimes be had to the conduct of the parties subsequent to the making of the contract: see S.M. Waddams, *The Law of Contracts*, (5th ed.) (Canada Law Book Inc., 2005) at pages 225-227. At p. 226, the author quotes the following, as the modern Canadian position, from the judgment of Lambert J.A. of the British Columbia Court of Appeal in *Canadian National Railway v. Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242 (B.C. C.A.), at p. 262:

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretation is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.

76 In this case, some of the subsequent conduct of the parties may be relevant, if it is concluded that there are two reasonable alternative interpretations of the agreement. All of the builders paid a number of invoices without having been given notice and an opportunity to effect repairs or correct damage. With respect to unpaid invoices, the builders

did not take the position that they were entitled to such notice or an opportunity to correct the damage until after the invoices had been rendered. If the contract is ambiguous, the conduct of the parties may be relied upon to assist in resolving the ambiguity.

77 As suggested by Lambert J.A., *supra*, the first step is to construe the agreement itself, to determine whether there are two reasonable alternative interpretations.

78 The agreements of purchase and sale are, of course, agreements of purchase and sale of land. However, they are not ordinary agreements of purchase and sale of land. It is understood that the purchasers will build on the land, as part of the overall objective of completing the subdivision for assumption by the municipality. In addition to paying the purchase price, the purchasers undertake certain other obligations, and undertake to defray certain other expenses.

79 For the most part, the purchaser's obligations are set out in Article 9 of the Agreement. Under Article 9, some specific costs are imposed on the builder, including:

(a) The cost of relocation of certain services within the lot in some circumstances (Article 9.01(e));

(b) Grading and sodding of boulevards and flankage, maintenance and removal of siltation fences, and tree planting adjacent to the lot (Article 9.01(f));

(c) Indemnification of the developer for damage to water boxes (Article 9.01(l));

(d) Payment of the purchaser's share of the costs of cleaning streets in the subdivision (Article 9.01(p));

(e) Cost of cleaning the road allowance, including boulevards, flanking the lots (Article 9.01(q));

(f) The cost of planting trees on a lot or on the boulevard if required by the subdivision agreement (Article 9.01(u));

(g) The builder will pay the cost of remedial work required if the developer enters upon a lot for the purpose of correcting a drainage problem or for the purpose of regrading or rectifying grading or to comply or effect compliance with the subdivision agreement (Article 9.01(aa));

(h) The builder is to install, erect, maintain and repair wooden screen fences abutting or along any of the lots (Article 9.01(hh)).

Many of these provisions impose direct obligations on the builder, rather than requiring the builder to repair or rectify damage.

80 The next provision of importance is Article 10. Article 10.02 requires the builder to indemnify and save harmless the developer from "any Damage caused by the Purchaser or any Related Party with respect to the Services and with respect to any matter or thing whatsoever within the subdivision plan". The terms "Damage", "Related Party" and "Services" are defined under Article 10.01. I have reproduced those provisions, *supra*, and I will not repeat them verbatim. I will paraphrase them as follows:

(a) The term "Related Party" includes virtually anyone related to the builder, any purchaser of any of the lots, or any invitee;

(b) The term "Services" is very broad, and includes survey stakes, iron bars, landscaping, tree planting, grading, sodding, curbs, curb cuts, streets, temporary or permanent roads, sidewalks, walkways, street signs, street lighting, sanitary and storm sewers (including lateral connections), water mains (including lateral connections), drainage, hydro service, gas service, telephone transmission lines, or other installations for public or private utilities;

(c) The term "Damage" includes the costs of rectifying the damage, the cost incurred in connection with replacing, relocating, rectifying or repairing any of the Services, or incurred in connection with rectifying roads or other services

> where dirt, debris, earth or any foreign material has been deposited, and incidental soft costs such as engineering, consulting and legal fees, and all damages flowing from a failure of the builder to perform any of the builder's obligations under Article 9, plus an administration fee of 20%.

81 It is to be noted that, pursuant to these provisions, the obligation imposed on the builder to indemnify the developer is very broad. The terms "Damage", "Related Party" and "Services" are very broadly defined.

82 Article 10.04 is also of importance. In summary, it requires the parties to inspect and agree upon any deficiencies in the services that may exist prior to closing the agreements of purchase and sale. The builder is to remedy and rectify damage that may be caused by the builder or a related party thereafter. Where damage may have been caused by more than one party, the allocation of responsibility is to be made by the consulting engineer.

83 It is within the context of these provisions that Article 11, and particularly 11.05, must be construed.

84 Article 11.01 requires the builder to furnish a security deposit, which "shall be held as a deposit on account of the indemnity given by the Purchaser referred to in Article 10 and on account of the purchaser's obligations under this agreement." Article 11.02 entitles the developer "to deduct from the Security Deposit from time to time any amount or amounts on account of any Damage to the Services as determined in accordance with Article 10 or any failure to perform any of the purchaser's obligations under this agreement." Article 11.02 also requires the builder to reinstate the security deposit to the original amount if the balance of the deposit is at any time less than 100% of the amount originally required.

85 Because of its importance, I will reproduce again the relevant part of Article 11.05:

> 11.05 Notice: In no event shall the Vendor, at the Purchaser's expense, repair any damage or draw upon the Security Deposit, prior to providing to the Purchaser written notice specifying the Damage or Default complained of and allowing seven (7) days for the Purchaser to remedy such default or repair the damage or commence and diligently undertake repair of the damage or a cure of such default within a reasonable time as determined by the Vendor but not exceeding 15 days from delivery of the written notice thereof by the Vendor...
>
> [emphasis added]

86 DBG argues that this provision must be read subject to an implied term that it has application only to any default or repair, sought to be remedied by the builder, that occurs within the lot lines. Each of Tas-Mari, Ballantry and Devonlea, on the other hand, contend that this provision is clear and unambiguous, and it requires DBG to give notice specifying the damage or default complained of, and allowing an opportunity for the builder to remedy the default or repair the damage, before DBG can repair the damage at the builder's expense or draw upon the security deposit. The builders argue that nowhere in the language is found any suggestion that its ambit is restricted to damage or default that occurs within the lot lines.

87 As noted earlier, the issue is whether there are two reasonable interpretations of this provision, which would allow me to consider extrinsic evidence or the commercial efficacy of one interpretation or another. The extrinsic evidence consists of the conduct of the parties subsequent to the execution of the agreement, and the expert evidence.

88 In the final analysis, I think there is only one reasonable interpretation of this provision. In my view, the language is clear and unambiguous. It requires written notice to be given to the builder of any damage or default for which it is sought to hold the builder liable, and allows seven days for the builder to remedy the default or repair the damage. In the absence of such notice, DBG cannot, at the builder's expense, repair any damage or draw upon the security deposit. I am simply unable to read into this language the implied term that DBG seeks to read in, namely, that the language only applies to damage or default that occurs within the lot lines. I come to this conclusion for a number of reasons.

89 First of all, the language of Article 11.05 refers to "Damage", which is very broadly defined in Article 10.01, and which includes "the total cost incurred or to be incurred in connection with replacing, relocating, rectifying or repairing

any of the Services". The term "Services" is, of course, itself defined broadly, and includes all of the general services within the subdivision.

90 Second, the language of Article 11.05 itself says nothing about damage or default that occurs within the lot lines. If it had been the intention of the parties to so restrict the ambit of the Article, it would have been easy for the parties to have said so, and they did not.

91 Third, while it is not difficult to accept the business efficacy argument, that is, that it is desirable that one contractor, and preferably the contractor who did the work in the first place, perform any repairs to the common services, it is nevertheless not an absurd result that repairs be effected by the builder or a contractor retained by the builder. While a greater degree of supervision and control would undoubtedly be necessary, I am not persuaded that repair and rectification could not be done in that fashion. Furthermore, to do so would have some benefits for the builder, who may be able to secure a lower price, and could avoid the extra fees for administration and engineering. Thus, while this interpretation produces some inconvenience, particularly for DBG, the result is not absurd or totally unworkable.

92 For these reasons, I conclude that Article 11.05 is not ambiguous, and it bears the meaning urged upon me by Tas-Mari, Ballantry and Devonlea. While that interpretation is not the most desirable from a business efficacy point of view, I am not persuaded that any other interpretation is open to me on the language the parties have used. Thus, DBG cannot successfully maintain its claim based on invoices for work done to correct damage, sought to be charged to the builders, where Article 11.05 was not complied with. Article 11.05 was only complied with regarding the cleaning of the storm water management pond.

93 In my view, the invoices for the cleaning of the storm water management pond cannot be claimed by DBG, notwithstanding that notice under Article 11.05 was actually given. The cleaning of the pond is not captured by Article 9. At its highest, it is claimed by DBG that some of the silt that ended up in the pond was likely the product of the activities of the builders, and thus constitutes "damage" that can be assessed by the engineer and allocated to the builders. This argument must fail. It is speculative, at best, that the silt came from the builders' activities. It is equally possible that the silt resulted from the lack of a siltation fence, which Mr. Fermanian acknowledged is usually around similar ponds, but was not in this case. Thus, the claim for $28,790.04, in the case of Tas-Mari, and $51,494.47, in the case of Devonlea, are disallowed.

94 Not all of the invoices fall within the ambit of Article 11.05, which applies only where there is damage or default that requires repair or a cure of such default. Some of the invoices, such as the planting of trees or erecting fences, are payable in any event, because they do not require repair or the curing of a default. Thus, the following amounts are governed by Article 9, and are payable in any event. They are not governed by Article 11.05:

(a) Tas-Mari: invoices dated July 18, 2005, August 29, 2005, and October 24, 2008, in the total amount of $9,609.38;

(b) Ballantry: invoices dated November 9, 2005, and January 5, 2006, in the total amount of $10,236;

(c) Devonlea: invoices dated April 19, 2005, July 18, 2005, August 25, 2005, and October 23, 2005, in the total amount of $117,919.40.

Accordingly, these amounts are payable regardless of any other consideration, and they are not subject to the arguments regarding unjust enrichment, estoppel, and waiver, to which I shall now turn.

95 As noted earlier, DBG advances two alternative arguments, namely, that the builders have been unjustly enriched by the payments for repairs made on their behalf by DBG, and that the builders are estopped by their conduct from disputing the impugned invoices, and/or they have waived their right to rely on Article 11.05. I will consider each of these arguments in turn.

96 The elements of an action in unjust enrichment are: an enrichment to the defendants; a corresponding deprivation to the plaintiff; and the absence of a juristic reason for the enrichment: see *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.); and *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.).

97 With respect to many of the amounts claimed by DBG in the disputed invoices, I do not see how there is any apparent enrichment to the builders, caused by the payments made by DBG. In many cases, the amounts claimed relate to work done on general services, including water mains and sewers, and curbs and sidewalks. These are services that DBG was, and is, required to install, repair and maintain to the satisfaction of the municipality. While DBG may be able to require the builders, contractually, to pay for some of the repairs to, or maintenance of, such services, it is difficult to see how the builders are "enriched" if DBG makes payment. Assuming they are enriched, however, there is clearly a juristic reason for it. Article 11.05 of the Agreement only requires them to pay the amounts claimed if they are given notice and an opportunity to rectify the damage or default. Without such notice, they are not required to pay.

98 For these reasons, the argument of DBG based on unjust enrichment must fail.

99 That brings me to DBG's argument based on estoppel and/or waiver. For the reasons that follow, that argument also fails.

100 The principles of estoppel as they relate to contractual issues are helpfully discussed in Waddams, *The Law of Contracts* (5th ed.), *supra*, at pages 140-149.

101 At p. 148, the author states: "The doctrine of waiver is closely associated with, and, some have suggested, practically indistinguishable from the principle of estoppel." Indeed, the author notes that in *Tudale Explorations Ltd. v. Bruce* (1978), 20 O.R. (2d) 593 (Ont. Div. Ct.), Grange J. (as he then was), stated that he was applying the doctrine enunciated in *Hughes v. Metropolitan Railway* (1877), L.R. 2 App. Cas. 439 (U.K. H.L.), and it did not matter "whether it be called waiver or promissory estoppel or variation of the contract or simply binding promises."

102 The classic statement of Lord Cairns in *Hughes v. Metropolitan Railway*, quoted with approval by Judson J. in *Conwest Exploration Co. v. Letain* (1963), [1964] S.C.R. 20 (S.C.C.), is as follows:

> It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.

103 In addition to *Conwest Exploration*, cases in the Supreme Court of Canada in which the concept is discussed include *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.), and *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641 (S.C.C.).

104 Another statement of the principle, quoted by Waddams, *supra*, at p. 140, is as follows:

> ...where one person ('the representor') has made a representation to another person ('the representee') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

105 It is unclear whether the "sword/shield" distinction, under which it is said that promissory estoppel can be used as a shield, but not as a sword, is still valid. See *Tudale Explorations*, *supra*, and *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459 (Ont. C.A.), and the discussion in Waddams, *The Law of Contracts* (5th ed.) at p. 146-147. See also *Doef's Iron Works Ltd. v. Mortgage Corp. Canada Inc.*, [2004] O.J. No. 4358 (Ont. C.A.).

106 Another feature of promissory estoppel is that its application does not result in a permanent alteration of the positions of the parties, unless the party relying on a promise or assurance cannot be restored to its original position: see the discussion in Waddams, *The Law of Contracts* (5th ed.), *supra*, at pages 142-143.

107 In this case, some invoices had been rendered by DBG to the builders that included repair work, where the builders were entitled to notice and opportunity to effect the repairs themselves. The builders paid those invoices. DBG then continued in the same vein, rendering invoices on the same basis. Lack of notice was informally raised on occasion, but specific reliance on Article 11.05 was only raised once virtually all of the invoices were rendered. Notice under Article 11.05 was given with respect to the cleaning of the storm water management pond, but I have already ruled that that claim is not maintainable in any event.

108 In my view, the requisites of promissory estoppel have not been established by DBG. Fundamentally, DBG did not alter its position as a result of any action or inaction on the part of the builders. Mr. DiBattista was clear in his evidence that he simply did not believe he was required to give notice under Article 11.05, and he did not do so based on that belief. Nothing the builders said, or did not say, induced DBG to act in a certain way. DBG simply acted on its own view of the ambit of Article 11.05, and did so at its own risk.

109 For these reasons, to the extent that any invoices fell within the terms of Article 11.05, and notice and an opportunity to repair or rectify damage were not given, the claims under those invoices are not maintainable. With respect to the one instance where notice under Article 11.05 was given, regarding the cleaning of the storm water management pond, I have already ruled that that claim is not maintainable.

110 In the result, DBG is entitled to payment of those invoices that do not fall under Article 11.05, which I have summarized at paragraph 94. Judgment shall issue accordingly. Prejudgment interest shall be paid at the statutory rate. If there is any dispute, I may be spoken to.

111 Judgment shall also issue against the builders for the restoration of the security deposits, assuming that the relevant subdivision or subdivisions have not yet been assumed by the municipality. The requirements of Article 11.02 are clear: the builder is required to replenish the security deposit if it stands at less than 100%, regardless of any other consideration. If there is any issue as to the form of the judgment in this respect, I may be spoken to.

112 That leaves for consideration DBG's claim against the directors of Ballantry and Devonlea.

113 The relevant provisions of the *Business Corporations Act* are as follows:

> **245.** In this Part, "complainant" means,
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> . . . . .
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part. ("plaignant").
>
> . . . . .
>
> **248.**(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

. . . . .

(j) an order compensating an aggrieved person;

114 In this case, DBG seeks to use these provisions to pierce the corporate veil, that is, it seeks an order requiring the directors of Ballantry and Devonlea to compensate DBG for amounts that the corporations are legally obliged to pay, but cannot pay because they have no assets.

115 It is clear that, at common law, the corporate veil will be pierced only in narrow circumstances. As was stated by Sharpe J. (as he then was) in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), at pages 433-34, aff'd (Ont. C.A.): "The courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct." On the facts of this case, I am unable to say that the corporate entities are being used as shields for fraudulent or improper conduct.

116 Section 248 of the *Business Corporations Act* permits the corporate veil to be pierced in a broader range of circumstances: see *G.T. Campbell & Associates Ltd. v. Hugh Carson Co.* (1979), 24 O.R. (2d) 758 (Ont. C.A.); *Chilian v. Augdome Corp.* (1991), 2 O.R. (3d) 696 (Ont. C.A.); *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div. [Commercial List]); aff'd in part (1998), 40 O.R. (3d) 563 (Ont. C.A.), *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.); *Budd v. Gentra Inc.* (1998), 111 O.A.C. 288 (Ont. C.A.); *Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd.* (2001), 20 B.L.R. (3d) 156 (Ont. S.C.J.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.); *Awad v. Dover Investments Ltd.* (2004), 47 B.L.R. (3d) 55 (Ont. S.C.J.); *Waiser v. Deahy Medical Assessments Inc.*, [2006] O.J. No. 224 (Ont. S.C.J.); *Fortnum v. Royal City Plymouth Chrysler (1991) Ltd.* (2006), 27 B.L.R. (4th) 60 (Ont. S.C.J.); and *Manufacturers Life Insurance Co. v. AFG Industries Ltd.* (2008), 44 B.L.R. (4th) 277 (Ont. S.C.J.).

117 In order to succeed under s. 248 of the *Business Corporations Act*, the plaintiff must satisfy a number of conditions:

(a) the plaintiff is, in the discretion of the Court "a proper person to make an application" under Part XVII of the *Act*;

(b) the Court must be satisfied that in respect of a corporation;

i) any act or omission of the corporation effects or threatens to effect a result;

ii) the business or affairs of the corporation are, have been or are threatened to be carried on or conducted in a manner; or

iii) the powers of the directors of the corporation are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any creditor.

Where these conditions have been satisfied, the Court may make an order to rectify the matters complained of, which can include an order compensating an aggrieved person. In a proper case, this can include an order against the directors of the corporation personally. Procedurally, an "application", as contemplated in s. 248, can be brought as an "action": see *Chilian v. Augdome Corp.*, *supra*.

118 Counsel for Ballantry and Devonlea, and their directors, argues that DBG was not a "creditor" at the time when the corporations distributed their profits. Accordingly, Mr. Moldaver submits that DBG cannot take advantage of s. 248 of the *Act* even if I could be persuaded that the circumstances are such that I should exercise my discretion in DBG's favour. I do not accept this submission.

119 The corporations distributed their profits over a period of time, as the work of the corporations within the subdivisions was completed. During much of this period, DBG and the corporations were engaged in disputes. DBG had drawn on the letters of credit, and the corporations were legally obliged to replenish them. Whether or not there were any outstanding invoices at the precise moment that the corporations distributed their last profits is of no moment. I am satisfied that, for the purposes of s. 248 of the *Act*, DBG was a "creditor" as that term is used in the *Act*. At the very least, the drawn-upon letters of credit had not been restored as required by Article 11.02.

120 Furthermore, it is not clear that the corporations distributed the last of their profits at the exact moment that they now say they did. The corporations were required to produce all of their financial records, including their banking documents, in order that DBG could satisfy itself as to when the relevant payments were made. The corporations declined to disclose those records. I draw the appropriate inference.

121 In my view, DBG is a proper person to make an application under Part XVII of the *Business Corporations Act*. Furthermore, I conclude that the actions of the corporations and their directors have been conducted or exercised in a manner, and to effect a result, that unfairly disregards the interests of DBG as a creditor.

122 The principals of the corporations are experienced in the homebuilding business. They know that developers and builders have obligations that come to an end only on assumption of a subdivision by the municipality.

123 The agreements of purchase and sale called for significant security deposits, to be satisfied by the provision of letters of credit. The agreements specifically require that those security deposits be replenished if they are reduced below 100%. The security deposits are to remain in place until the subdivisions are assumed by the municipality. After those security deposits were drawn upon by DBG, the principals of the corporations made conscious decisions that they would not replenish them. The purpose of those security deposits is to provide funds out of which DBG could make claims for monies that it claims were owing to it. If the corporations and their principals believed that DBG had improperly drawn upon the security deposits, their remedy was to sue. What they were not entitled to do was to decline to replenish the security deposits, decline to pay outstanding invoices, and nevertheless pay out all of the profits of the corporation leaving nothing for DBG if DBG were to succeed in this action, as it did, at least in part.

124 The principals of the corporations knew, at all relevant times, that these claims were outstanding, and would likely end up being litigated, as they were. If properly advised, they were aware that there was a risk that their position would not be sustained, and that DBG's position might prevail. Notwithstanding that knowledge, the principals of the corporations nevertheless paid out all of the profits leaving nothing for DBG.

125 In my view, the requisites of s. 248 of the *Act* have been satisfied, and in order to rectify the matter, I order that the directors of Ballantry and Devonlea compensate DBG in an amount equal to the judgments against the corporations. Of the cases referred to, the most relevant in this connection are *Sidaplex*, *S.C.I. Systems*, *Gestion*, *Trans-Tek*, *Downtown Eatery* and *Fortnum*.

126 If there is any issue as to the wording of the formal judgment in this respect, I may be spoken to.

Costs

127 I will entertain written submissions with respect to the costs of these proceedings, not to exceed five pages, together with a bill of costs. Counsel for DBG shall serve and file his submissions within ten days. Counsel for the other parties shall file their submissions within a further ten days. Counsel for DBG shall have five days to reply.

Claims and cross-claims allowed in part.

2011 ONCA 189
Ontario Court of Appeal

Tas-Mari Inc. v. Dibattista*Gambin Developments Ltd.

2011 CarswellOnt 1414, 2011 ONCA 189, 109 O.R. (3d) 603,
16 C.L.R. (4th) 233, 2 R.P.R. (5th) 10, 80 B.L.R. (4th) 1

Tas-Mari Inc., Plaintiff (Respondent) and DiBattista*Gambin Developments Limited, Defendant (Appellant)

DiBattista*Gambin Developments Limited, Plaintiff by Counterclaim (Appellant) and Tas-Mari Inc., Domenic Tassone and Ottavio Tassone, Defendants by Counterclaim (Respondent)

DiBattista*Gambin Developments Limited, Plaintiff (Appellant) and Fernbrook Homes (Creditview) Limited, Nick Cortellucci, Gino DiGenova, Danny Salvatore, Ballantry Homes (Fletcher's Meadow) Inc., David Hill, David N. Hill, Atul Vanmali, Devonlea Estates Inc., Bobby Bhoola, Hawksview Estates Inc., Stanley Cash, Tom Schonberger, Tas-Mari Inc., Domenic Tassone and Ottavio Tassone, Defendants (Respondents/Appellants by way of Cross-Appeal)

Ballantry Homes (Fletcher's Meadow), Hawksview Estates Inc. and Devonlea Estates Inc., Plaintiffs by Counterclaim (Respondents/Appellants by way of Cross-Appeal) and DiBattista*Gambin Developments Limited, Defendant by Counterclaim (Appellant/Respondent by way of Cross-Appeal)

John Laskin, J.C. MacPherson, H.S. LaForme JJ.A.

Heard: February 22, 2011
Judgment: February 22, 2011
Written reasons: March 10, 2011
Docket: CA C51311

Proceedings: affirming *Tas-Mari Inc. v. Dibattista*Gambin Developments Ltd.* (2009), 2009 CarswellOnt 9680 (Ont. S.C.J.); and affirming *Tas-Mari Inc. v. Dibattista*Gambin Developments Ltd.* (2009), 2009 CarswellOnt 4602, 85 R.P.R. (4th) 196, 85 C.L.R. (3d) 83, 97 O.R. (3d) 579, 63 B.L.R. (4th) 228 (Ont. S.C.J.)

Counsel: Robert D. Malen, for Appellant / Respondent by way of Cross-Appeal, DiBattista*Gambin Developments Limited
Alistair Riswick, for Respondent, Tas-Mari Inc.
Brett D. Moldaver, for Respondents / Appellants by way of Cross-Appeal, Ballantry Homes (Fletcher's Meadow) Inc., David Hill, David N. Hill, Atul Vanmali, Devonlea Estates Inc., Bobby Bhoola

***Per curiam* (orally):**

1 The appellant, DiBattista*Gambin Developments Ltd. ("DBG") appeals from the judgments of Gray J. dated August 5 and October 20, 2009. In these judgments, which followed a two-week trial of two joined actions, the trial judge held that DBG was not entitled to bill the respondent builders for certain repairs in a residential building project because DBG had not complied with a notice provision in the agreements between the developer DBG and various builders.

2 In the same judgments, the trial judge held that the respondents Devonlea Estates Inc., David Hill and Bobby Bhoola had to post security to continue to cover the possibility that DBG would call on them for their shares of the cost of repairs ordered by the municipality.

3 DBG appeals on the notice issue. Devonlea, Hill and Bhoola cross-appeal on the posting of security issue.

The Appeal

4 DBG submits that the trial judge erred in his interpretation of Article 11.05 of the contract, which provides:

> 11.05 Notice: In no event shall the Vendor, at the Purchaser's expense, repair any damage or draw upon the Security Deposit, prior to providing to the Purchaser written notice specifying the Damage or default complained of and allowing seven (7) days for the Purchaser to remedy such default or repair the Damage or commence and diligently undertake repair of the Damage or cure of such default within a reasonable time as determined by the Vendor but not exceeding 15 days from delivery of the written notice thereof by the Vendor ...

5 In many instances DBG did not provide the notice required by Article 11.05 to the builders with respect to repairs in the common areas of the multi-builder project on the basis that Article 11.05 required notice only for repairs that were ordered on the lots actually developed by each builder. The trial judge held that this was too narrow a reading of the provision and that, therefore, the builders did not have to contribute towards repairs for which they had received no notice.

6 On appeal, DBG submits that the trial judge erred in his interpretation of Article 11.05 by not properly considering (i) the agreement as a whole; (ii) the factual matrix within which the agreement was made; and (iii) repairs "within the lot lines" as an implied term of the contract. Further, DBG submits that the trial judge erred in not holding that Article 11.05 was, at the very least, ambiguous. Because of this ambiguity, the post-contractual conduct of the builders (in paying invoices from DBG and raising no complaints about notice) was relevant in that it indicated that the builders held the same interpretation as did DBG.

7 Finally, DBG relies on the doctrine of promissory estoppel. DBG contends that by paying several invoices though no notice had been given, the builders represented that notice was not required, and DBG relied on those representations.

8 We called on the respondent builders on DBG's submission on promissory estoppel.

9 On the interpretation of the agreement, we agree with the trial judge that Article 11.05 was not ambiguous, and, on its clear language, covered services within and outside the lot lines. We also agree with the trial judge that there is no basis to imply a "within the lot lines" term into Article 11.05. Such an implied term might, as the trial judge recognized, have made the agreement work more efficiently, but it is far from an obvious term. Other provisions of the agreement — for example Article 10.04 — show we cannot presume the parties intended that the notice requirement in Article 11.05 was to be confined to services within the lot lines.

10 Finally, we are not persuaded that the trial judge erred in finding that DBG had not made out a case of promissory estoppel. Mr. DiBattista's own evidence demonstrated that for his own reasons he was determined to disregard the notice provision. Nothing the respondents did affected his decision to do so.

11 Accordingly, the appeal is dismissed.

The Cross-Appeal

12 Devonlea Estates Ltd. seeks to reverse the term of the trial judge's order requiring it to post security (now reduced to half the original amount under the agreement). Mr. Hill and Mr. Bhoola seek to reverse the term of the judgment requiring them to personally post the security.

13 We do not agree with either of these submissions. On the first issue, the builders had a clear obligation to maintain a security deposit in accordance with the agreement. Devonlea did not do this and the trial judge made an order that simply reinstated this component of Devonlea's obligation. On the issue of the personal liability of Mr. Hill and Mr.

Bhoola, in the light of the structure of Devonlea and the roles of Mr. Hill and Mr. Bhoola, the trial judge's decision to assign personal liability to them was consistent with the cases he cited in para. 125 of his judgment.

14 In the end, we are satisfied that the trial judge interpreted the agreement in a sensible way that was fair to all parties. The effect of the trial judge's decision was to remedy, fairly, each side's breach of some of the provisions of the agreement.

15 Accordingly, the cross-appeal is also dismissed.

Costs

16 DiBattista*Gambin Developments Ltd. shall pay the respondent, Tas-Mari Inc., its costs of the appeal the amount of $20,000, plus disbursements and applicable taxes. DiBattista*Gambin Developments Ltd. shall also pay the respondents, Ballantry Homes (Fletcher's Meadow) Inc., David Hill, David N. Hill, Atul Vanmali, Devonlea Estates Inc., and Bobby Bhoola, their costs of the appeal in the amount of $20,000, plus disbursements and applicable taxes. In turn, those respondents as cross-appellants shall pay DiBattista*Gambin Developments Ltd. its costs of the cross-appeal in the amount of $10,000, plus disbursements and applicable taxes.

Appeal dismissed; cross-appeal dismissed.

1989 CarswellOnt 890
Ontario Supreme Court

Canadian Opera Co. v. 670800 Ontario Inc.

1989 CarswellOnt 890, [1989] C.L.D. 1188, 16 A.C.W.S. (3d) 372, 69 O.R. (2d) 532

Canadian Opera Company Applicant v. 670800 Ontario Inc., Carrying on Business as Euro-American Motor Cars and John Van Essen Respondent

Hollingworth J.

Oral reasons: June 13, 1989
Docket: Doc. RE1251/89

Counsel: *N.B. Gross* for the Applicant.
G.G. Hector for the Respondent.

***Hollingworth J.*: (Orally):**

1 This is an application for a declaration granting judgment against both respondents on the basis of the following facts. Implicit in this application is a request for leave to bring the application, and that is the first question I must determine.

2 On October 6, 1988 the Canadian Opera Company (the C.O.C.) endeavoured to purchase a 1988 Ferrari from 670800 Ontario Inc. and Van Essen for $131,760. Van Essen promised delivery on October 20, 1988 and the fact is that delivery has never been made. Incredibly, C.O.C. delivered the money before receiving the car, and did not check to find out whether or not the numbered company or Van Essen were registered and carried on business under the *Motor Vehicle Dealers Act*. They were not registered as such and were subsequently convicted under the *Act*.

3 C.O.C. has indicated it never did receive the car, and only $10,000 as part repayment. It asks for the balance, plus interest plus costs. I understand that the numbered company is a shell, and both defendants face innumerable fraud charges.

4 The applicant sues under the *Business Corporations Act, Statutes of Ontario* 1980, Chapter 4 and subsequent amendments and particularly ss. 244 and 247 of that Act. It will be seen that this application for relief is under the oppressive section of that statute.

5 It is necessary to cite some sections of this statute: s. 244 reads, in part, as follows:

244. Interpretation.-In this Part,

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. . . . .

(b) "complaint" means,

(i) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) any other person who, in the discretion of the court, is a proper person to make an application under this Part. *New*.

245. (*1*) *Derivative actions*. - Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

(2) *Idem*.- No action may be brought and no intervention in an action may be made under subsection (1) unless the complainant has given fourteen days' notice to the directors of the corporation or its subsidiary of his intention to apply to the court under subsection (1) and the court is satisfied that,

(a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

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. . . . .

246. Court order. - In connection with an action brought or intervened in under section 245, the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order authorizing the complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; ...

247. (*1*) *Application to court: oppression remedy*. - A complainant, the Director and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) *Idem*. - Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation of any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) *Court order*. In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

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. . . . .

> (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
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> . . . . .
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> (j) an order compensating an aggrieved person;
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> . . . . .

6 Historically, it will be seen that this oppressive section originally dealt with a director or shareholder and allowed such to sue the company, but this was extended by s-s. 244(b)(iii) which states:

> 244(b)(iii) any other person who, in the discretion of the court, is a proper person to make an application under this Part. *New*

7 The fact that a creditor may sue is confirmed also by the fact that in s. 247 the operative cause says that any act:

> that is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder, *creditor*, director or officer of the corporation, the court may make an order to rectify the matters complained of.

8 Mr. Gross argues that his client is a complainant under s. 244(b)(iii) and is of course a creditor under s. 247. Mr. Hector indicates that this *Act* was not meant to cover a creditor in the applicant's position and as a result thereof, the creditor has many other remedies and is precluded from suing under this particular section.

9 The jurisdiction, as would be expected for a brand new section of a statute, is sparse. Mr. Gross relies heavily on an Alberta case which covers exactly the same section, namely 244(b)(iii). This case is *First Edmonton Place Limited v. 31588 Alberta Ltd., Majeski, Johnson and Sereda* 1988 60 Alberta Law Reports (2d) 122. In this prolix, carefully reasoned and comprehensive decision, Mr. Justice McDonald has really, so far as I can divine, explored this area for the first time, namely that a creditor may apply for judgment under the oppressive section of the *Companies Act*.

10 In the result, the learned Judge found against the applicant in that case because the applicant did not establish that there was a creditor-debtor relationship. Mr. Gross distinguishes this case because clearly, he contends, there is a creditor-debtor relationship as soon as C.O.C. contracted for the car, particularly because they had turned over the money. I would agree with him in this aspect.

11 As I see it, Mr. Gross has to establish that the applicant is a person who could reasonably be entrusted with the responsibility of advancing the interest of the corporation by seeking to remedy a wrong allegedly done to the corporation. Once this is established, and I think that Mr. Gross has been able to do so by bringing the applicant under s. 244(b)(iii), then the matter of good faith must be established and "it appears to be in the interest of the corporation or subsidiary that the action be brought."

12 On the facts in this case, it appears clear that the good faith of the applicant in this case cannot be impugned.

13 Finally, the tests of inequity, oppression, unfair prejudice and unfair disregard of the interests of the corporation must be weighed, and I have no hesitation in finding that the applicant succeeds under this head.

14 I therefore find that the applicant is a complainant under s-s. 244(b)(iii) and I give him leave to bring this application. I further find that he has met the requirements of the subsections of the *Act* to which I have already alluded, and I therefore give him a declaration to the effect that judgment will go in the amount of $131,760.00 less the return of the $ 10,000.00 or a total of $121,740.00 plus interest according to the *Judicature Act* from October 8, 1988.

15 The applicant is also entitled to its costs on a solicitor and client basis, against both defendants.

Canadian Opera Co. v. 670800 Ontario Inc.

1990 CarswellOnt 2722, [1990] O.J. No. 2270, 24 A.C.W.S. (3d) 629, 75 D.L.R. (4th) 765, 75 O.R. (2d) 720

Canadian Opera Co. v. 670800 Ontario Inc., c.o.b. as Euro-American Motor Cars, and Van Essen

Bell J., Desmarais J., O'Driscoll J.

Judgment: November 19, 1990
Docket: 872/89

Proceedings: Affirmed, 69 O.R. (2d) 532, 1989 CarswellOnt 890 (Ont. H.C.)

Counsel: *Neil B. Gross*, for applicant (respondent)
Glenn G. Hector, for respondents (appellants)

***O'Driscoll J.*:**

1 The appellant, John Van Essen, appeals under s. 254 of the *Business Corporations Act, 1982*, S.O. 1982, c. 4. The numbered company has abandoned its appeal.

2 The numbered corporation, pursuant to an order of Madam Justice Bell, dated May 3, 1989, was found to be a "motor vehicle dealer" under s. 1(*f*) of the *Motor Vehicle Dealers Act*, R.S.O. 1980, c. 299, and the appellant, John Van Essen, by the same order, was found to be a "salesman" under s. 1(*h*) of the same Act. An appeal was launched from that order, but the material indicates that it was abandoned.

3 On the material before us, it is undisputed that the respondent paid to the appellants $131,760 and, in return, the Canadian Opera Company was to receive a 1988 red Ferrari. It is also undisputed that the appellants received the money and have not delivered the motor vehicle, nor have they returned the money, save and except $10,000.

4 It is undisputed that the appellants agreed to repay the money, as set out in the letter of March 10, 1989 (Appeal Book, p. 35). The letter, addressed to the numbered company's trading name, Euro-American Motor Cars, is from counsel for the Canadian Opera Company. It starts out this way:

> This letter records our agreement on the terms for your repayment of monies to the Canadian Opera Company ...

It sets out the dates, the amounts and the time.

5 Paragraph 2 states:

> Mr. John Van Essen and 670800 Ontario Inc. both will execute the enclosed Consent to Judgment, and you will deliver the signed Consent to me with your payment on Tuesday, March 14. I will have the Judgment issued immediately but will not file it with the Sheriff so long as the above-listed payments are made in full and on time. If you wish, the Canadian Opera Company will provide a release and satisfaction piece upon final payment being made.

6 Since the corporation is deemed to be a "motor vehicle dealer" under s. 1(*f*) of the *Motor Vehicle Dealers Act* because it held itself out as carrying on the business of buying and selling motor vehicles, it is caught by the motor vehicle dealers regulations, R.R.O. 1980, Reg. 665, as amended by O. Reg. 54/86, s. 5.

> 20.(1) Where a motor vehicle dealer receives funds in excess of $10,000 towards the purchase of a motor vehicle prior to the delivery of the motor vehicle, the entire amount received shall be deemed to be trust funds. [rep. & sub. O. Reg. 54/86, s. 5(1)]
>
> . . . . .
>
> (4) Where trust funds are paid under subsection (1) whether by way of deposit, down payment or otherwise, on account of an undelivered motor vehicle, the motor vehicle dealer shall retain such funds in trust for the purchaser until
>
> (a) the motor vehicle is delivered;
>
> (b) the contract is mutually cancelled; or
>
> (c) direction or authority is received from the Registrar concerning disbursements. [am. O. Reg. 54/86, s. 5(2)]

7 On the record before us, it appears that, literally and figuratively, the trust funds have "gone south" to Mr. Van Essen's cohort, Lyle Lathe, in Wilmington, North Carolina. Wherever they went, the appellant has not returned the trust money to the respondent.

8 Mr. Justice Hollingworth held [reported (1989), 69 O.R. 532] that the funds in question are trust funds within the meaning of the regulations quoted above. He held that the respondent was a "complainant" within the provisions of s. 244(*b*)(iii) of the *Business Corporations Act, 1982*:

> 244. In this Part,
>
> . . . . .
>
> (b) "complainant" means,
>
> . . . . .
>
> (iii) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

9 It was also held that the respondent was a "creditor" in the expanded view of that term. See *G.T. Campbell & Associates Ltd. v. Hugh Carson Co.* (1979), 24 O.R. (2d) 758, 7 B.L.R. 84, 11 C.P.C. 1, 99 D.L.R. (3d) 529 (C.A.), and *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Q.B.) [appeal adjourned (1989), 71 Alta. L.R. (2d) 61, 45 B.L.R. 110, [1990] 2 W.W.R. 670 (C.A.)], at pp. 152, 162 and 163 [60 Alta. L.R.].

10 It is our view that the acts of the corporation were oppressive, were unfairly prejudicial or unfairly disregarded the interest of the respondent *creditor* (not the appellant corporation).

11 Section 247 of the *Business Corporations Act, 1982* [reads]:

> 247.(1) A complainant, the Director and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> . . . . .

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

. . . . .

(j) an order compensating an aggrieved person ...

12 It was also found by Mr. Justice Hollingworth that this was an appropriate case to pierce the corporate veil because Mr. Van Essen was the president, the sole director and the sole shareholder of the numbered company.

13 Much argument was directed to us that there should be a trial of an issue to sort out disputed questions of fact. In our view, on this record, there are no material questions of fact in dispute that require a trial and/or the trial of an issue.

14 In summation, for these reasons, we agree with the result reached by Mr. Justice Hollingworth. The appeal is, therefore, dismissed. (Submissions on costs were heard.)

15 I have endorsed the back of the Appeal Book as follows:

For the oral reasons given for the Court by O'Driscoll J., the appeal is dismissed. The costs of this appeal are to be paid by the appellant, Van Essen, to the respondent, on a solicitor-client basis and are set at $5,000 and payable out of the money paid into court as security for costs.

2001 CarswellOnt 4270
Ontario Superior Court of Justice

Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd.

2001 CarswellOnt 4270, [2001] O.J. No. 4710, [2001] O.T.C. 860,
110 A.C.W.S. (3d) 69, 14 C.C.E.L. (3d) 116, 20 B.L.R. (3d) 156

Gestion Trans-Tek Inc., GTT-Stats International Inc. and Richard Rochefort, Applicants and Shipment Systems Strategies Limited, Shipment Systems Inc. and Paulette O'Donnell, Respondents

C. Campbell J.

Heard: October 26, 2001
Judgment: November 26, 2001
Docket: 01-CL-4271

Counsel: *Barry Bresner*, for Applicants
Maureen L. Whelton, for Respondents

***C. Campbell J.*:**

1 The Applicants seek a declaration that the actions of the Respondents were oppressive to the Applicants, contrary to s. 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c.B-16, as amended ("*OBCA*") and seeks to hold the Respondents jointly and severally liable to the Applicants for the amount of a judgment as against Shipment Systems Strategies Limited ("SSSL.")

2 In addition, the Applicants seek relief under the *Bulk Sales Act*, R.S.O. 1990, c.B-14.

Background

3 Michael Lampel and SSSL are joint and several judgment debtors to the Applicant Trans-Tek for the amount of $157,054.12 plus costs, pursuant to the judgment of the Honourable Mr. Justice Wilkins, found at *Gestion Trans-Tek Inc. v. Lampel*, 2001 CarswellOnt 1061 (Ont. S.C.J.). Lampel and SSSL are joint and several judgment debtors to the Applicant Rochefort in the amount of $37,646.58 plus costs, pursuant to the judgment of the Honourable Mr. Justice Wilkins, found at *Gestion Trans-Tek Inc. v. Lampel*, 2001 CarswellOnt 1128 (Ont. S.C.J.).

4 Lampel had been associated with the Plaintiffs commencing in 1990 in a business operated by the Applicants. Lampel had a contract that not only defined his duties, but specified what would happen should the contract be terminated. Lampel was in fact terminated in July of 1997 and following negotiation, entered into a settlement of his claims against the Applicants.

5 The terms of the settlement as found by Mr. Justice Wilkins included a payment to Lampel in return for which Lampel agreed to continue to abide by two clauses in the previous contracts, and not to solicit clients of the Plaintiffs.

6 The operative part of the contract that was incorporated into the settlement provided as follows:

> 6) ML will keep confidential all GT information, work methods and client information.

14) ML agrees to not contact any GT employee, client or potential client being pursued in Quebec or Ontario for two years after leaving GTT. If ML or new employer does not abide by this clause,

(a) a penalty of 60% of gross revenue totalled over a period of two years on any GG client or potential client will be paid by either one to GTT on demand;

(b) if GTT loses anyone of its employees to ML or new employer, a penalty equivalent to the employee's yearly salary will be paid by either one to GTT on demand.

7 Lampel breached the settlement agreement, which gave rise to the action heard by Justice Wilkins, which resulted in a decision dated April 3, 2000. The judgment in that action included relief as against SSSL, a company incorporated by Paulette O'Donnell, the spouse of Lampel. The finding of Wilkins J. was that Lampel was the directing mind of SSSL, notwithstanding that his spouse was its sole director and shareholder.

8 The action that gave rise to was commenced in 1998 and O'Donnell was examined for discovery in that action in October of 1999. In the summer of 2000, O'Donnell incorporated another company, Shipment Systems Inc. (hereafter, "SSI") and became an officer and director of SSI and knowingly permitted or acquiesced in the transfer of the assets of SSSL to SSI. It would appear that at the time of the transfer, among other matters, SSSL was indebted to Revenue Canada for G.S.T. and payroll taxes in amounts that have not been paid.

9 On February 2, 2001, before the trials of the two actions before Wilkins J., Lampel completed a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*. The Applicants were unaware of this intention and were unaware prior to March 22, 2001 of the fact that Lampel had filed an assignment in bankruptcy on March 14, 2001.

10 During the course of the actions heard by Wilkins J., neither O'Donnell nor Lampel ever advised the Court or the Applicants that it was Lampel's intention to make an assignment in bankruptcy.

11 The Applicants did not learn of the existence of SSI, which had been incorporated in June of 2000, until after the trials before Wilkins J., and were not aware that SSSL had ceased doing business in July of 2000.

12 There was no *Bulk Sales Act* ("*BSA*") application for SSSL filed with the Superior Court of Justice in respect of the sale of assets from SSSL to SSI.

13 The Applicants have been unsuccessful in attempts to recover judgments in action 1206 as against SSSL.

Position of the Respondents

14 The Respondent O'Donnell relies on the finding of Wilkins J. that although she appears in the incorporation documents as the president, secretary and treasurer of SSSL, it is her husband, Lampel, who is the company's alter ego and controlling mind and that O'Donnell has had no involvement whatsoever in the day-to-day function or activities of SSSL, notwithstanding certain payments to her.

15 The Respondents do not take issue that in June of 2000, O'Donnell signed Articles of Incorporation for a new company, SSI, at the request of her husband.

16 There is a related U.S. company, which is a shareholder of SSI. One Patrick Garahan, who is a shareholder of 3S-US, was a former personal shareholder of SSSL.

17 The explanation given by the Respondents and by Garahan for the transfer of assets from SSSL to SSI is that in response to a request to make a further investment in SSSL in the spring of 2000, Mr. Garahan was only prepared to do so with an increased ownership in a new company.

18 It is the position of the Respondents that SSI was not created to shield the assets of SSSL from potential judgment, but rather because the U.S. company, 3S-US, was not prepared to invest further funds into SSSL, but was prepared to do so into a new company.

19 The position of the Respondents is that SSSL did make arrangements with its creditors at the time of the sale of the assets to SSI and that at that time, the Applicants were not creditors of SSSL.

Issues

(1) Are the Applicants "complainants" within the meaning of the *OBCA*?

(2) If so, are the Applicants entitled to relief under s. 248 of the *OBCA*?

(3) Is there relief available for the non-compliance with the *BSA*?

Analysis & Law

20 Section 241(1) *CBCA* states that a "complainant" may apply to a court for an order under the oppression section. The definition of "complainant" for the purpose of both an oppression proceeding under s. 241 and a derivative proceeding under s. 239 is set out as follows in s. 238:

> "Complainant" means:
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

21 The Respondents rely on the conclusion of Mr. Justice Farley in the case of *Royal Trust Corp. of Canada v. Hordo*, [1993] O.J. No. 1560 (Ont. Gen. Div. [Commercial List]) that:

> The person qualifies as a "complainant" must be in that capacity at the time of the acts complained of: see *Trillium Computer Resources Inc. v. Taiwan Connection Inc.* (1992), 10 O.R. (3d) 249 (Gen.Div.) at p. 253; *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta.Q.B.) at 60, rev'd on other grounds (1989), 45 B.L.R. 110 (Alta.C.A.)

22 The Respondents also rely on the passage in the reasons of Farley J. in *Royal Trust v. Hordo*, *supra* in paragraphs 12 and 13, as follows:

> ¶12. A creditor is not specifically defined as a "complainant" under the CBCA and therefore creditors generally are not "complainants" as of right. The court may use its discretion to grant or deny a creditor status as a complainant under s. 238(d). It does not seem to me that debt actions should be routinely turned into oppression actions: see *R. V. Sands Motor Hotel Ltd.* (1984), 28 B.L.R. 122 (Sask.Q.B.); *Canadian Opera Co. v. 670800 Ontario Inc.* (1989), 69 O.R. (2d) 532 at 536 (H.C.J.) aff'd (1989), 75 O.R. (2d) 720 (Div.Ct.); *Jacobs Farms Ltd. v. Jacobs*, [1992] O.J. No. 813 (Gen.Div.); *First Edmonton*, *supra*. I do not think that the court's discretion should be used to give a "complainant" status to a creditor where the creditor's interest in the affairs of the corporation is too remote or where the complainants of a creditor have nothing to do with the circumstances giving rise to the debt or if the creditor is not proceeding in good faith. Status as a complainant should also be refused where the creditor is not in a position analagous to that of the minority shareholder and has "no particular legitimate interest in the manner in

which the affairs of the company are managed": *Jacobs*, *supra* at pp 12-14. See *Lee v. International Consort Industries Inc.* (1992), 63 B.C.L.R. (2d) 119 (C.A.) at pp 127-9 and *Canadian Opera*, *supra*, at p. 536 (H.C.J.)

¶13. As well it is clear that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person really holds a speculative claim to become a creditor in the future which will materialize only if the legal action is successful and judgment is obtained: see *Quebec Stell Products (Industries) Ltd. v. James United Steel Ltd.*, [1962] 2 O.R. 349 at pp. 351-5 and 358; *First Edmonton*, *supra* at pp. 111-2; *Mohan v. Philmar Lumber (Markham) Ltd.* (1991), 50 C.P.C. (2d) 164 (Ont.Gen.Div.) at pp. 165-6

23 The position of the Respondents is succinctly set out in paragraphs 40 and 41 of their factum:

¶40. It is respectfully submitted that while in some circumstances courts have used their discretionary power to allow judgment creditors to avail themselves of the oppression remedy, those circumstances are relatively rare and are fact-driven. A creditor must have sufficient "interest" in the affairs of the company in question, either analogous to that of a minority shareholder or with a reasonable expectation that the company's affairs would be conducted with a view to protecting the creditor's judgment, before discretion is exercised in its favour.

¶41. It is respectfully submitted that, in the instant case, the applicants did not have a reasonable expectation that the company's affairs would be conducted with a view to protecting their uncertain claim for unliquidated damages. The 1998 action against SSS requested an unspecified amount of damages for vicarious breach of fiduciary duty and vicarious breach of duty of good faith and fidelity and damages for copyright infringement. The 1999 action against SSS requested $1,000,000.00 for defamation, slander of goods, intentional interference with economic relations, inducing breach of contract and conspiracy, as well as $1,000,000.00 in punitive and aggravated damages. The applicants could not have reasonably expected that the affairs of SSS would be conducted with a view to protecting those claims.

24 The position of the Applicants is that they do come within the definition of a complainant and as a creditor as that concept is used under s. 248 of the *OBCA*. It is urged that the entire scheme of Lampel was at its root designed to enable Lampel to compete in breach of his agreement without risk to the business assets employed.

25 The relief that is available to a complainant so found is set out in s. 248(2) of the *OBCA* is as follows:

248(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner;

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner;

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of R.S.O. 1990, c. B. 16, s. 248 (2).

26 The Applicants rely on the decision of the Ontario Court of Appeal in *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563 (Ont. C.A.) for the proposition that a creditor may be a complainant for the purpose of relief under s. 248.

27 In particular, the Applicants rely on the decision of the Court of Appeal for Ontario in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.). In that case, a former employee was successful at trial in obtaining

an injunction against his employer B Inc. but was unable to realise on the judgment since due to a reorganisation, B Inc. ceased to do business.

28 The Court held that while the corporate reorganisation was undertaken for business reasons unrelated to the employee's action, nevertheless the employee's judgment could be enforced against the successor or merged companies, on the basis of relief under s. 248(2) of the *OBCA*, as the true employer was the consortium of merged companies and the former employee qualified as a complainant, having a reasonable expectation that the company's affairs would be conducted with a view to protecting his interests. The Respondents, by transferring the assets in circumstances of being aware of the employee's claim and potential judgment, entitle the employee to be protected and to an oppression remedy.

29 The Court at p. 177 of the judgment states:

> ..."oppressive conduct" that causes harm to a complainant need not be undertaken with the intention of harming the complainant... If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

30 Counsel for the Respondent relies on the following comments at p. 178:

> In our view, there is no question that the acts of Grad and Grosman, as the directors of Best Beaver, in causing the company to go out of business and transferring its assets to other companies within the group of companies they owned and operated in the spring of 1996 in the face of a trial scheduled to begin a few months later, effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of, Alouche as a person who stood to obtain a judgment against Best Beaver. Moreover, there was nothing that Alouche could have done to prevent the effective winding-up of Best Beaver.

and at paragraph 62:

> It was the reasonable expectation of Alouche that Grad and Grosman, in terminating the operations of Best Beaver and leaving it without assets to respond to a possible judgment, should have retained a reserve to meet the very contingency that resulted. In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely-held company, is clear. By diverting the accumulated profits of Best Beaver to other companies that they owned, they were able to insulate those funds from being available to satisfy Alouche's judgment.

31 Mr. Bresner for the Applicants submits that the *Downtown Eatery* case applies directly to the facts and issue on this application.

32 Counsel for the Respondents sought to distinguish *Downtown Eatery* on the basis that at the time of the transfer of the assets in this matter from SSSL to SSI, the Applicants were not creditors, much less judgment creditors, and therefore did not qualify as complainants. Further, counsel submitted, that unlike *Downtown Eatery*, there is no evidence to suggest the ability of SSI to have kept a reserve of assets, which would have provided fulfilment of the judgment against SSSL.

33 I am satisfied, both from the reasoning of Farley J. in *Royal Trust v. Hordo*, *supra* and more particularly from the reasoning of the Court of Appeal in *Downtown Eatery*, that the Applicants here may be regarded as creditors for the purposes of being complainants entitled to a remedy under s. 248 of the *OBCA*. The Applicants were, pursuant to a contract with the Respondents, entitled to very specific relief in the event that their contract was breached. The Applicants had commenced their action and were proceeding to trial on that action at the time that assets were transferred. The conclusions reached by Wilkins J. confirmed that at the time of the transfer, the Applicants were much more than holders of a speculative claim to become creditors in the future. They were entitled to relief under contract and were required to obtain a judgment to attempt to enforce that contract. It is in this sense that the Applicants may be accorded the status of creditors under s. 248 of the *OBCA*.

34 The relief sought here is not unlike the relief obtained in *Downtown Eatery*, *supra*, substituting the Applicants for the employee.

35 At paragraph 4 of that decision, the Court stated:

> [4] A second important issue in this appeal is the availability of an oppression remedy to a dismissed employee in the context of a corporate reorganization shortly before a wrongful dismissal trial which has the effect of denying the employee any recovery on a judgment he obtains at the trial.

36 Here, an individual in the position of an employee breached a contract, which validly restricted competition and to avoid judgment, transferred the assets in the company in which he breached his covenant, to another company, to avoid recovery on a judgment. On this basis, the Applicants are entitled to oppression remedy relief.

37 Counsel for the Respondents submitted that the only evidence before the Court was to the effect that the transfer was done for valid business reasons, given the need for further infusion of funds, which would not have been forthcoming but for the transfer. The reasons of the Court of Appeal in *Downtown Eatery*, *supra* would appear to allow for an oppression remedy, notwithstanding that business assets were transferred for a valid purpose, if the effect of the transfer is to preclude a complainant from pursuing an otherwise valid claim to judgment.

38 In this case, at least one major purpose of the transfer of assets was to avoid exposure of those assets to judgment. In my view, that is sufficient to attract oppression relief.

39 For the above reasons, I conclude that the Applicants are entitled to utilise the oppression remedy provided in s. 248(2) of the *OBCA*. Since there are other shareholder interests, the precise nature of that relief will await further determination following submissions of the parties, including on the issue of costs. In the interim, the Respondents will be enjoined from taking any steps to transfer or dispose of any of their assets, other than in the ordinary course of business, until such time as this matter is disposed of by the Court.

40 The cross-motion of the Respondents was not proceeded with and will therefore be dismissed.

Application granted.

2008 CarswellOnt 9688
Ontario Superior Court of Justice

Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.

2008 CarswellOnt 9688

Tannis Trading Inc., carrying on business as Tannis Food Distributors and McDonald Bros Construction Inc., plaintiffs and Coldmatic Refrigeration of Canada Ltd. o/a Coldmatic Building Systems, CBS Coldmatic Building Systems, C.R.C. Inc., and George Zafir, defendants

Michael Quigley J.

Heard: September 17-18, 2008
Judgment: December 18, 2008
Docket: 05-CV-31861-SR

Proceedings: affirmed *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.* (2010), 2010 ONSC 5747, 2010 CarswellOnt 10667 (Ont. Div. Ct.)

Counsel: Patrick Thompson, for Plaintiff, Tannis Trading Inc., carrying on business as Tannis Food Distributors
Patrick Summers, for Defendants

***Michael Quigley J.*:**

1 Tannis Trading Inc., carrying on business as Tannis Food Distributors ("Tannis") claims:

a) damages in the amount of $50,000 as follows:

i) breach of contract;

ii) negligence;

iii) failure to comply with requirements of the *Bulk Sales Act*, R.S.O. 1990 c.B.14, as amended;

iv) breach of warranty pursuant to the *Sale of Goods Act*, R.S.O. 1990 c.S.1, as amended; and

v) oppression pursuant to s.248 of the *Ontario Business Corporations Act*, R.S.O. 1990 c.B.16 as amended.

b) Pre-judgment and post-judgment interest on the total amount found owing by the defendants, pursuant to the *Courts of Justice Act*;

c) costs of this action on a solicitor and client basis; and

d) Such further and other relief as this Honourable Court may deem just.

Issues

2 The central issues in this case are:

1. Is Coldmatic Refrigeration of Canada Ltd. ("Coldmatic") liable to Tannis for damages?

2. If Coldmatic is liable, what are the damages? and

3. Is George Zafir personally liable to Tannis for the damages of Coldmatic?

Background

3 Tannis is a corporation with offices in the city of Ottawa, Ontario, carrying on the business of supplying food products to restaurants, fast-food institutions and various establishments in the food service industry in eastern Ontario and western Quebec.

4 The corporate defendant, Coldmatic, was purchased in the 1960's by the defendant, George Zafir ("Zafir"). It operated as a closely held corporate entity from that time until July 2005 when it was sold to a United States company.

5 Coldmatic ceased its business operations in Canada at the time of the 2005 sale, and from the evidence, is currently a holding company controlled by Zafir and his family members. In 2005, Coldmatic changed its name to C.R.C. Inc. ("CRC"). Zafir is an officer and director of CRC/Coldmatic, but denies that he is a shareholder of that company.

6 In 2000, Tannis contracted with Coldmatic to supply and install a freezer box in a commercial building that was to be constructed by McDonald Bros Construction Inc. ("General Contractor").

7 Tannis engaged the services of Temprano, Young and Ward Architects Inc. ("TYW"), who prepared the plan specifications for the project. Section 1140 of the plans and specifications provided, among other things, that "only products manufactured by Balley Refrigerated Boxes Inc. may be used".

8 On July 28, 2000 Tannis received a quotation from David Card of Coldmatic to supply and install consolidated panels for the freezer box. The quotation was for $133,000 plus applicable taxes.

9 In August of 2000, TYW submitted a Change Order to Tannis for approval, for a change in the freezer box system, from Balley Refrigerated Boxes Inc. to CBS Systems ("CBS") with Clark Doors.

10 In August 9, 2000, Eli Tannis confirmed that CBS had been approved as the selected supplier and installer of the freezer box.

11 On August 11, 2000, Ian Young of TYW sent a fax transmission to David Card of Coldmatic, regarding questions on the design of the CBS freezer box. See Exhibit '8' to the Affidavit of Eli Tannis, Page 121 of Exhibit '1A'. Paragraph 5 of that fax transmission reads as follows:

> You indicated that you do not normally design your systems with the freezer panel outside the roof structure. Please provide information from your engineering department indicating that CBS can provide freezer box with a sloped roof, as indicated on our plans, and that the complete box will perform without limitations.

12 Coldmatic responded in a letter dated August 17, 2000 (see page 129 of Exhibit '1A') from David Card to Ian Young of TYW. Paragraph 5 of that letter reads as follows:

> The insulated panels being used for the roof and walls will perform to the published data for the standards they have been tested for and are listed in our specification. The insulated panels do carry a ten year factory warranty.

13 There was further communication between TYW and Coldmatic with respect to shop drawings between the time the contract was signed and the commencement of construction on December 13, 2000.

14 The contract was completed, and Coldmatic was paid in full. A warranty was provided to Paul McDonald of the General Contractor.

15 During the summer of 2001, Tannis experienced problems with respect to condensation, water leaking and ice, emanating from the ceiling panels, forming on the floor.

16 Coldmatic was not informed of any problems until 2004 when Coldmatic was invited to bid on a freezer box to be installed in an addition to the existing building. The invitation to bid contained in the September 7, 2004 communication from Tannis to Coldmatic was apparently an attempt by Tannis to receive a credit of $25,000 against the current job which was eventually awarded to Coldmatic despite their reluctance to provide this credit.

17 The communication from Tannis to Coldmatic was responded to by Czerny So in a letter dated November 1, 2004, see page 180 of 'Exhibit '1A'. The letter reads as follows:

> It is a very unfortunate situation that the roofer who installed the standing seam deck to your freezer roof in 2000 did not use a EPDM membrane over the insulated panels, which it is now related to be the cause of the leaking problem to your freezer roof.
>
> Normally, waterproof membrane is not necessary if the roof is adequately sloped and the panel joints are properly sealed. In your situation, there is a lack of air movement underneath the roof deck. Humidity build up in the summer days can have the trapped vapour migrate through the panel joints and eventually causing leaks. This should have been noted under the roofer's installation detail.
>
> In responding to your letter of September 7, 2004, CBS is willing to offer Tannis Food with a credit value of $5,000 towards the next purchase of Coldmatic product with a value not less than $75,000. This credit will only apply if you remedy your problem with proof to us that this is being done correctly. Nevertheless, it is no way to understand that CBS admit any liability or responsibility by offering such credit, but rather a good will gesture to appreciate your past business and to keep a good customer relationship.
>
> I hope the above mentioned is to your satisfaction.

It appears from this letter that as of November 1, 2004, Coldmatic and CBS are one and the same entity.

18 George Zafir gave evidence that the EPDM membrane was not in common use in the industry in 2000. However, by 2004 EPDM had in fact become a standard in the industry. The plans and specifications in 2000 did not call for the EPDM membrane.

19 Ian Young of TYW was retained by Tanis in November 2005 to do an investigation with respect to the deficiencies in the 2000 project. Young concluded that there was no vapour barrier. He found a six millimeter gap between one of the freezer panels and recommended a sealant over the whole freezer box. He further concluded that Coldmatic's design was deficient.

20 BBS Construction (Ontario) Ltd. ("BBS") in a July 17, 2007 letter to Tannis, priced two options for the correction of the design deficiencies (see page 194 of Exhibit '1A'). The first option was to remove and re-install the existing metal roof after installing a Bakor Blue Skin vapour barrier membrane to all joints. The total cost of this option was $31,625, plus GST. The second option provided for the removal and replacement of the metal roof after applying Blue Skin to all joints, for a total cost of $73,945, plus GST.

21 The General Contractor also retained an engineering firm Brook Van Dalen & Associates ("Brook"), to conduct a review of the freezer box and its deficiencies. David Moore, senior consultant of Brook concluded in his report that moisture was entering the freezer box but he could not determine the source of the leak. See pages 196-199 of Exhibit '1A'.

22 The only corrective measure undertaken by Tannis to date has been applying a foam sealant to a single joint that they took to be the source of the water leakage.

23 On July 29, 2005, Coldmatic was sold to an American firm and received an exemption under the *Bulk Sales Act* for that sale, notwithstanding the fact the company had been put on notice of this claim by solicitors for Tannis.

24 Tannis and the General Contractor settled the claim as between themselves with respect to this project, with Tannis to receive monetary credit on a future contract to be completed between the parties.

Position of the Plaintiff

25 The plaintiff argues:

4. the freezer box was not fit for the purpose for which it was sold;

5. Tannis was relying on the experience of Coldmatic;

6. Coldmatic was aware that Tannis's consulting firm TYW was relying on the expertise of Coldmatic; and

7. Coldmatic and Zafir knew of Tannis's claim at the time of the sale of Coldmatic in 2005 and proceeded with the sale without regard to the legitimate claim of Tannis.

Defendants' Position

26 Coldmatic and Zafir submit:

1. there is no evidence Coldmatic did not properly perform the work for which it was contracted;

2. there is a lack of evidence of any problem with the freezer box (irrespective of Coldmatic's responsibility);

3. in any event, Coldmatic and Zafir assert that Tannis has sustained no damages;

4. if there were damages incurred by Tannis, they are not connected to the defendants Coldmatic and Zafir;

5. there have been no efforts by Tannis to remedy the problems with the freezer; and

6. in any event the defendant Zafir is not personally liable to Tannis under the oppression remedy of the *Business Corporations Act*.

Legislation and Case Law

27 Pursuant to subsections 15 (1), (2) and (3) of the *Sale of Goods Act*, R.S.O. 1990 c.S.1, there is an implied warranty that the goods will be reasonably fit for the purpose for which they were sold. Under the *Bulk Sales Act*, R.S.O. 1990 c.B.14, a creditor means any creditor, including an unsecured trade creditor and a secured trade creditor.

28 Section 248.1 of the *Business Corporations Act*, R.S.O. 1990, c.B.16, provides:

> (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
>> (a) any act or omission of the corporation or any of its affiliates affects or threatens to effect a result;
>>
>> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

29 In the Ontario Supreme Court decision of *Landev Developments Inc. v. Clarke & Adamson Construction Ltd.*, [1990] O.J. No. 1784 (Ont. H.C.), Justice Saunders at page 5 stated:

> The limitation on the obligation of a contractor to correct defects and deficiencies has been subject to consideration litigation. It would appear that where a building contract specifies a particular kind of material, the builder is not liable to the owner for complying with the specifications even though the material proves to be unsuitable for its purpose, unless the owner relies on the skill and judgment of the builder, with respect to the suitability of the materials.

30 In the 1972 decision of the Ontario Court of Appeal decision *Pizzolati & Chittaro Manufacturing Co. Ltd. v. May et al*, Justice Arnup writing for the majority concluded that a claim for unliquidated damages does not establish a creditor within the meaning of the *Ontario Bulk Sales Act*.

31 In *Gignac, Sutts & Woodall Construction Co. v. Harris*, [1997] O.J. No. 3084 (Ont. Gen. Div.), Justice Zalev held that although a solicitor's account was not a debt or liquidated demand, the solicitor qualified as a "creditor" under s.248 of the *Business Corporations Act* in respect of the account if it was unpaid by a corporation. In that case, the court found that the respondents exercised their powers as directors of the company in a manner which unfairly disregarded the interests of the applicant, and the applicant was therefore entitled to an order of compensation. Justice Zalev concluded that "[E]ach case turns on its own facts. What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another."

32 In the case of *Nowlan v. Brunswick Construction Ltd.* (1974), 49 D.L.R. (3d) 93 (S.C.C.), the Supreme Court of Canada affirmed the principle that an experienced contractor is under a duty to warn of the dangers inherent in executing an architect's plans, even when the work is carried out in accordance with such plans and specifications.

Analysis

33 Here, it is clear from the evidence that the plaintiff's architects, TYW were relying on the expertise of the defendant Coldmatic with respect to the freezer box. I find that the omission of the requirement for the EPDM membrane from TYW's plans and specifications does not relieve the defendant Coldmatic from its obligation to warn the plaintiff of the dangers of installing a freezer box without this membrane.

34 The evidence of George Zafir at trial that the EPDM membrane was not industry standard in 2000 is clearly at odds with his employee So's letter of November 1, 2004. Mr. So was not called as a witness to explain his November 2004 correspondence. I therefore reject the evidence of Zafir with respect to the issue of industry standards in 2000.

35 Mr. Zafir's evidence with respect to the sale of Coldmatic in 2005 and the structure of the holding company that survived the sale was no help to the court. About the only thing the court learned from his evidence is that the holding company that survived the sale is not an active company, but the court did not learn if the company has any assets to satisfy a judgment. The sale which closed at the end of July, 2005 was clearly perfected after Coldmatic had been put on notice of the claim of Tannis. During cross-examination, Mr. Zafir gave evasive and unsatisfactory answers. The court is left with the inescapable conclusion that the holding company is judgment proof and has no assets to satisfy a judgment. I find in these circumstances that the oppression remedy under s.248 of the *Business Corporations Act* is applicable.

Issue of Liability

36 I find further that Tannis was entitled to rely on the expertise of Coldmatic, and that the freezer box supplied by Coldmatic was not entirely suitable for the purposes for which it was sold. The court has to take into account however that the freezer box is still being used by Tannis, with its deficiencies, and that the only corrective action taken by Tannis to date has been the aforementioned foam sealant on one joint.

Issue of Coldmatic Damages

37 I find however that Tannis sustained damages in the amount of $31,625 plus GST as referred to in paragraph 20 above; the corporate defendant Coldmatic is responsible for these damages together with pre-judgment interest from September 7, 2004, when Coldmatic was first put on notice of the claim, to the date of judgment, and post-judgment interest.

Issue of Zafir Damages

38 I find further that the defendant George Zafir acted in a high-handed manner on the sale of the privately held company, with total disregard to the plaintiff's claims of which the company and he personally were aware. The Bulk Sales Declaration at the time of the sale of Coldmatic was at the very least in error, and possibly was executed in a manner which ignored the outstanding claim of Tannis. Accordingly, I find that pursuant to s.248 of the *Business Corporations Act*, Tannis is entitled to a remedy against the defendant George Zafir. An Order therefore will be made that George Zafir is personally liable to Tannis for the damages caused to the plaintiff by the corporate defendant, Coldmatic.

Costs

39 If counsel cannot agree on the issue of costs, they may make submissions in writing to my Brockville chambers, 41 Court House Square, Brockville, K6V 7N3, to be no longer than five typewritten pages and to be received by January 31, 2009.

Action allowed.

2010 ONSC 5747
Ontario Superior Court of Justice (Divisional Court)

Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.

2010 CarswellOnt 10667, 2010 ONSC 5747, [2010] O.J. No. 5109, 85 B.L.R. (4th) 77

Tannis Trading Inc. carrying on business as Tannis Food Distributors and McDonald Bros. Construction Inc., Plaintiffs/Respondents and Coldmatic Refrigeration of Canada Ltd. o/a Coldmatic Building Systems, CBS Coldmatic Building Systems, CRC Inc., and George Zafir, Defendants/Appellants

H. Rady, G. Valin, L. Ferrier JJ.

Heard: October 7, 2010
Judgment: November 29, 2010
Docket: Ottawa 09-DV-1482

Proceedings: affirming *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.* (2008), 2008 CarswellOnt 9688 (Ont. S.C.J.)

Counsel: David Debenham, for Plaintiffs / Respondents
Patrick Summers, for Defendants / Appellants

***H. Rady J.*:**

1 The appellants (collectively "Coldmatic") appeal from the judgment of Mr. Justice M. J. Quigley awarding judgment of $31,625. plus GST and interest and costs of $19,500. to the respondent Tannis Trading Inc. ("Tannis").

2 Coldmatic is in the business of designing, manufacturing, supplying and installing freezer paneling systems. It supplied and installed freezer panels and doors for a new refrigeration system for Tannis in 2000. Tannis is in the business of supplying food products to restaurants and the food service industry. The general contractor for the project was McDonald Brothers Construction ("McDonald Bros."). It was originally named as a co-defendant but was subsequently substituted as a plaintiff following a settlement with Tannis by the terms of which McDonald Bros. offered Tannis a construction credit of $9,000.

3 Tannis commenced an action against the appellant alleging breach of contract, negligence, breach of warranty under the *Sale of Goods Act*, R.S.O. 1990, c.S.1, failure to comply with the requirements of the *Bulk Sales Act*, R.S.O. 1990, c.B.14 and for an oppression remedy under the Ontario *Business Corporations Act*, R.S.O. 1990, c.B.16. Tannis alleged that Coldmatic negligently installed the freezer panels causing condensation and water leakage, leading to the accumulation of ice on the floor, which created a hazard for workers. Icicles also formed and fell from the roof. It further alleged that the director and president of Coldmatic, George Zafir, was personally liable under the oppression remedy provisions of the Ontario *Business Corporations Act*. It alleged that an affidavit filed in support of an order granting an exemption under the *Bulk Sales Act* when the company was being sold, was misleading.

4 Following a summary trial, Justice Quigley concluded that Coldmatic was negligent because it failed to warn Tannis and its architects of the need to install an ethylene propylene diene monomer ("EPDM") membrane on top of the freezer ceiling panels to insulate and better control the difference between the outside and inside temperatures. Accordingly, the freezer box was not fit for the purpose it was sold.

5 Justice Quigley made this finding at para. [33] of his reasons:

> Here it is clear from the evidence of the Plaintiff's architects, TYW were relying upon the expertise of the Defendant Coldmatic with respect to the freezer box. The omission of the requirement for the EPDM membrane from TYW's plans and specifications does not relieve the Defendant Coldmatic from its obligation to warn the Plaintiffs of the dangers of installing a freezer box without this membrane.

6 Justice Quigley concluded that Mr. Zafir was personally liable. He was found to have acted in a high handed manner, because the assets of the company were sold after receipt of notice of Tannis' claim and it was left judgment proof. Accordingly, an oppression remedy was appropriate.

7 Coldmatic submits that the trial judge made the following palpable and overriding errors:

> (1) In concluding that it had a duty to warn of the need for the installation of an EPDM membrane which was not the industry standard in 2000 and was in any event, the responsibility of the roof designer and architect;
>
> (2) in finding that Tannis had sustained any damages because the leak was successfully remediated in 2006 and further that it had taken no steps to install an insulating membrane even at the time of trial;
>
> (3) by failing to take into consideration the impact of the settlement with McDonald Bros. and the issue of betterment on the calculation of damages; and
>
> (4) in concluding that Tannis was a creditor entitled to an oppression remedy.

8 Coldmatic also submits that the trial judge's award of costs was excessive for a summary trial that lasted one and one-half days.

9 The respondent's position is simply stated: the trial judge made no palpable and overriding errors and his conclusions are amply supported by the evidence and the relevant law. His award of costs was appropriate in the circumstances.

10 We have concluded that the appeal must be dismissed. There was a clear evidentiary basis on which the trial judge could arrive at the conclusions that he did. First, it is important to note that this was a design/build project and Coldmatic was intimately involved in the design of the freezer box. Tannis' architects had no experience with its product and asked many questions about the Coldmatic freezer design. There were concerns about whether the panels would be resistant to wind and moisture and whether the vapour seal between the panels was sufficient to prevent ice formation under the roof, all of which were communicated to the appellant. Tannis' architects made explicit inquiries about whether modifications to the roof were necessary to accommodate the freezer unit, as a result of which certain changes were made to the roof joists. However, Coldmatic made no recommendation with respect to the roof slope or the ventilation, all of which was within its expertise. As a result, the trial judge was correct in concluding that it failed to warn Tannis about the potential for difficulties.

11 There was an issue whether the use of EPDM membranes was the industry standard in 2000. Justice Quigley referred to a letter dated November 2004 written by Mr. So, a salesman with Coldmatic, after Tannis had communicated its concerns about the installation. He said:

> It is a very unfortunate situation that the roofer who installed the standing seam deck to your freezer roof in 2000 did not use an EPDM membrane over the insulated panels, which it is now related to be the cause of the leaking problem to your freezer roof.
>
> Normally waterproof membrane is not necessary if the roof is adequately sloped and the panel joints are properly sealed. In your situation, there is a lack of air movement underneath the roof deck. Humidity build-up in the summer days can have the trapped vapour migrate through the panel joints and eventually causing leaks. This should have been noted under the roofer's installation detail.

12 The clear conclusion to be drawn is that Mr. So confirmed that an EPDM membrane should have been used at the time of construction or else the slope of the roof should have been changed.

13 Mr. Zafir testified that it was not the industry standard to use an EPDM membrane in 2000. However, in his affidavit for trial, he deposed that "[o]rdinarily Coldmatic would not recommend whether an EPDM membrane was appropriate for a project but would, if asked about the best way to ensure that warm weather outside the freezer structure does not cause water to come from a roof of a structure through to into the freezer, would mention to its clients the existence of an EPDM membrane option. Normally, however, a waterproof membrane is not necessary if a roof is adequately sloped and, the panel joints properly seals, and proper air movement is circulated beneath the roof of the structure itself..."

14 Mr. Zafir's own evidence supports the trial judge's conclusion.

15 Further, Coldmatic's contention that the problems had been remediated is not supported by the evidence. While it is true that some corrective action was taken by Tannis in 2006, it did not successfully solve the problem. The trial judge may have misapprehended the extent of the remedial action taken but the only evidence was that leaking persisted even at the time of trial. Further, it is not unreasonable for a plaintiff to await the outcome of trial before proceeding with further repairs.

16 Coldmatic submits that if an EPDM membrane were installed, it would represent significant betterment. It further submits that it could have been installed for $15,000.00 when the project was being completed and it is entitled to have that amount deducted from any damages awarded.

17 Tannis is entitled to be put in the position that it would be in had Coldmatic given it proper advice. There was no evidence at trial that the installation of an EPDM membrane would have cost more. On this issue, the decision of the Nova Scotia Court of Appeal in *Byrne Architects Inc. v. A.J. Hustins Enterprises Ltd.* (2003), 23 C.L.R. (3d) 217 (N.S. C.A.) is instructive. In that case, an architect was hired to design an office building and parking garage. During the first winter after construction was completed, tenants of the first floor of the building complained of cold floors. The architect added insulation which corrected the problem. The architect was found liable for failing to design the building without adequate insulation and he was ordered to pay the cost of the installation of the extra insulation. At trial, it was submitted that if the extra insulation had been included in the original design, the plaintiff would have paid a higher price for the initial construction and therefore, it suffered no loss. The trial judge rejected that argument. The Court of Appeal agreed. The court noted that "[t]here is no evidence the price would have changed if extra insulation had been specified originally. It would not be appropriate for the trial judge or this court to speculate whether the fixed price would have been higher if additional insulation had been included". Those comments are apposite here.

18 Further, even on Mr. Zafir's evidence, the proper advice might have been to change the slope of the roof or to provide a space between the roof and the ceiling of the freezer box to allow for ventilation and evaporation. Had those changes been made at the design stage, they might have been made at no extra cost. Coldmatic bears the responsibility for the situation in which Tannis finds itself regardless.

19 There is no reason to disturb the trial judge's finding with respect to the quantum of damages. It was supported by the evidence and in particular a quote respecting the costs to install a Bakor Blue Skin vapour barrier membrane to all joints. He favoured this option which was considerably less expensive than a second option offered.

20 We see no merit in the argument that Coldmatic was entitled to credit for the McDonald Bros. contribution to a settlement. Its action was in the nature of subrogation against Coldmatic.

21 Finally, there is the issue with respect to the availability of an oppression remedy. Mr. Summers limited his submission to whether the trial judge was entitled to conclude that Tannis was a creditor as that term is used in the *Act* and has been come to be understood. Sections 248(1) and (2) of the *Act* provide as follows:

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c.27, s. 71 (33).

Idem

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c.B.16, s. 248(2).

Court order

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

. . . . .

(j) an order compensating an aggrieved person;

22 The definition of a complainant includes "any other person, who in the discretion of the court, is a proper person to make an application under this Part": s. 245(c) of the Act.

23 By way of background, Tannis sent a letter to Coldmatic putting it on notice of a claim on September 7, 2004. This letter prompted Mr. So's response of November 1, 2004 referred to earlier. This was followed by a demand letter dated February 28, 2005, giving notice of an intention to litigate if the matter was not resolved amicably by March 15, 2005. On March 17, 2005, Mr. Zafir signed a letter of intent to sell all of the appellants' assets. On July 25, 2005, Mr. Zafir swore an affidavit in support of a *Bulk Sales Act* exemption in which he deposed that "the sales...will not impair the ability of the creditors to be paid in full". The exemption order was granted on July 27, 2005 and the asset sale closed shortly thereafter. Mr. Zafir deposed that the proposed purchase price for the assets involved was $85,000,000. Coldmatic's employees were dismissed and it ceased to carry on business. A statement of claim in this matter was issued on August 2, 2005.

24 The essence of Coldmatic's submission is that a creditor for an unliquidated claim is not entitled to a remedy because debt actions should not be routinely turned into oppression actions. Authority for this proposition is found in *R. v. Sands Motor Hotel Ltd.* (1984), 28 B.L.R. 122 (Sask. Q.B.); *Canadian Opera Co. v. 670800 Ontario Inc.* (1989), 69 O.R. (2d) 532 (Ont. H.C.); aff'd (1990), 75 O.R. (2d) 720 (Ont. Div. Ct.); and *Jacobs Farms Ltd. v. Jacobs*, [1992] O.J. No. 813 (Ont. Gen. Div.).

25 It has been observed in some cases that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person really has only a speculative claim to become a creditor in the future in the event that it successfully obtains judgment. See, for example, *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349 (Ont. H.C.); *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.); rev'd on other grounds (1989), 45 B.L.R. 110 (Alta. C.A.); and *Mohan v. Philmar Lumber (Markham) Ltd.* (1991), 50 C.P.C. (2d) 164 (Ont. Gen. Div.).

26 However, there are cases in which a creditor has been granted relief under the *Act* where those in control of the corporation have stripped it of assets or dissipated assets rendering it immune to a judgment. See, for example, *Gignac, Sutts & Woodall Construction Co. v. Harris*, [1997] O.J. No. 3084 (Ont. Gen. Div.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.) var'd on other grounds (1998), 110 O.A.C. 160 (Ont. Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.); and *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563 (Ont. C.A.).

27 In the circumstances of this case, the trial judge had evidence before him on which he could reasonably conclude that oppressive conduct had occurred. In particular, he was disturbed by the timing of the agreement to sell assets and the failure to set aside a reserve for Tannis' claim of which Coldmatic had notice. He found that Mr. Zafir was evasive in his evidence about whether he personally benefited from the sale. We see no basis on which to disturb the exercise of his discretion and his finding that Tannis was a complainant and entitled to a remedy.

28 Finally there is no basis to interfere with the trial judge's award of costs. He considered the proper principles. We note that disbursements account for approximately $7,000. of the award. The fees, therefore, fall within the appropriate range.

29 The appeal is dismissed with costs to Tannis fixed at $8,000.

***G. Valin J.*:**

I agree

***L. Ferrier J.*:**

I agree

Appeal dismissed.

1994 CarswellSask 287
Saskatchewan Court of Queen's Bench

A E Realisations (1985) Ltd. v. Time Air Inc.

1994 CarswellSask 287, [1994] S.J. No. 684, [1995] 3 W.W.R. 527, 127 Sask. R. 105, 17 B.L.R. (2d) 203, 52 A.C.W.S. (3d) 537

A E REALISATIONS (1985) LTD. v. TIME AIR INC., HOWARD COOK and 177078 CANADA INC. (formerly North Canada Air Ltd.)

Noble J.

Judgment: December 14, 1994
Docket: Doc. Saskatoon Q.B. 2749/94

Counsel: *J.E. Seibel*, for applicant.
R.W. Thompson, for Time Air Inc.
J.P. Peacock, Q.C., for Howard Cook.
No one representing 177078 Canada Inc. (formerly North Canada Air Ltd.).

***Noble J.*:**

1 The applicant by notice of motion seeks, inter alia, the following relief:

2 (a) An order pursuant to Pt. XX of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("C.B.C.A."), that it is a proper person to be designated as a complainant within the meaning of s. 238(*d*) of the said Act;

3 (b) An order granting it summary judgment against Time Air Inc. and Howard Cook (hereafter "the respondents") in the amount of $543,548.34 plus interest and costs;

4 (c) Alternatively, an order pursuant to s. 239 granting it leave to bring an action in the name and on behalf of 177078 Canada Inc. against Time Air and Cook and that it shall control the conduct of such action pursuant to s. 240(*a*).

Background Facts

5 1. North Canada Air Ltd. ("Norcanair") was incorporated under the C.B.C.A. in September 1980.

6 2. In 1985 the applicant sued Norcanair and a related company, High-Line Airways Ltd., for damages arising out of an alleged sales contract arrangement to facilitate the purchase of jet aircraft by Norcanair.

7 3. Before the action had proceeded to trial the shareholders of Norcanair on March 16, 1987 sold and transferred all of the outstanding shares to Time Air which then named the respondent Cook and one Richard H. Barton as directors of the said company.

8 4. On December 31, 1987 Time Air arranged the following steps to be taken in relation to Norcanair:

9 (a) the assets of Norcanair were transferred to Time Air;

10 (b) Norcanair was dissolved and struck from the register on the grounds that it had "no property and no liabilities" pursuant to ss. 203 and 204 of the C.B.C.A. then in force. The dissolution was done using what is called the short form method, which does not require notice be given to any interested party when a corporation has no assets or liabilities.

11 5. The agreement to transfer assets provides that Time Air will assume "all ... indebtedness and obligations of Norcanair, whether actual, accruing or contingent, and for which, either before the date hereof or thereafter, Norcanair is or becomes liable for". In addition, Time Air acknowledges that Norcanair informed it of the outstanding action taken by the applicant against Norcanair when it purchased the shares in March 1987.

12 6. The applicant's law suit proceeded and eventually came to trial in the fall of 1991. The former directors of Norcanair conducted a full answer and defence to the applicant's claim. Following the completion of the evidence the applicant's solicitor became aware, for the first time, that Norcanair had been dissolved in December 1987 and that the assets of that corporation had been transferred to Time Air. The action proceeded to judgment on April 16, 1992 [103 Sask. R. 87] with the court awarding the applicant $500,000 in damages plus costs and interest. In July 1992 the applicant sought to have Time Air added as a party defendant to the action, thereby making it a judgment debtor, but the application failed on the ground it was not a party to the contract between Time Air and Norcanair. The applicant did not appeal this decision. On the other hand Norcanair appealed the judgment against it but withdrew before the court could hear it on June 9, 1993 [reported 113 Sask. R. 12].

13 7. On March 7, 1994 the original North Canada Air Ltd. was revived as a corporation under the name 177078 Canada Inc. on the applicant's initiative and the directors remained as Howard G. Cook and Richard H. Barton. I note here that the revived company was given a different name (i.e. 177078 Canada Inc.) because on July 26, 1988 the principals of the original North Canada Air Ltd. incorporated a new company using the same name, no doubt taking advantage of the fact that when Time Air dissolved the corporation the name became available.

14 8. By letter dated April 5, 1994 the applicant wrote Cook and Barton demanding that as directors of 177078 Canada Inc. they bring an action in the name of that company against Time Air pursuant to the indemnity clause in the agreement between Time Air and Norcanair dated December 31, 1987 (see para. 5, supra).

15 9. As it turned out Richard H. Barton had predeceased the applicant's demand and Howard G. Cook through his counsel declined to bring the action by letter dated June 16, 1994 and resigned his directorship of 177078 Canada Inc. effective May 31, 1994.

16 10. The applicant then brought this motion.

17 The parties agree that there are three issues to be determined, viz.:

18 (1) Is the applicant a complainant within the meaning of s. 238(*d*) of the C.B.C.A.?

19 (2) Should the court grant the applicant a summary judgment against Time Air and Cook pursuant to s. 241 of the Act?

20 (3) Alternatively, should the applicant be granted leave to commence a derivative action on behalf of 177078 Canada Inc. against Time Air and Howard Cook pursuant to s. 239 of said Act and have the carriage of such action?

21 In general terms the applicant complains that the directors in charge of Norcanair and Time Air from time to time acted so oppressively and unfairly towards it with respect to its attempt to acquire and later enforce its judgment against Norcanair that the court should make an order rectifying the matter pursuant to s. 241(2) which reads:

> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (*a*) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

I shall return to the detail of the complaint in a moment but I must first determine whether or not the applicant qualifies as a "complainant" entitled to pursue what is commonly called the oppression remedy.

(1) Is the applicant a complainant?

22 The term "complainant" is defined by s. 238. It reads:

238. In this Part,

"complainant" means

(*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(*c*) the Director, or

(*d*) any other person who, *in the discretion of a court, is a proper person to make an application under this Part*. (emphasis is mine)

23 The applicant was at one point a contingent creditor of Norcanair (now 177078 Canada Inc.) but eventually became a judgment creditor. It alleges that the actions of the directors of Norcanair both before and after the sale of shares to Time Air were oppressive, unfairly prejudicial to and unfairly disregarded its interests as a known creditor of Norcanair. It argues further that Time Air as the only shareholder of Norcanair also acted oppressively to its interests as a known creditor through the direc tors it elected to the board of Norcanair, i.e. Barton and Cook. The question then is whether in these circumstances the applicant qualifies as a proper person to be a complainant.

24 Time Air advances a number of arguments to suggest the applicant does not qualify.

25 First, it suggests that a "complainant" which seeks status as a creditor under s. 241 must not only have a liquidated claim in debt against the corporation but must be possessed of such a debt at the time of the oppressive acts complained of. This is not the case with the applicant because at the time of the alleged oppressive acts which took place at the end of 1987 its claim was for unliquidated damages — it was at best a contingent claim for liquidated debt. In support of this submission counsel points to such cases as *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div.); *R. v. Sands Motor Hotel* (1984), 28 B.L.R. 122 [[1985] 1 W.W.R. 59] (Sask. Q.B.); *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.); and *Trillium Computer Resources Inc. v. Taiwan Connection Inc.* (1992), 10 O.R. (3d) 249 (Gen. Div.).

26 In support of this argument the respondents submit that at the time of the dissolution of Norcanair the applicant was not a creditor and cannot qualify as a proper person to become a complainant even if it can be argued that the conduct of the then directors of Norcanair and Time Air could be termed oppressive under s. 241(2) of the Act.

27 Counsel relies heavily on the *Hordo* case to support this position. In that case Royal Trust sued Hordo on a promissory note in 1991. Hordo filed a complicated defence and counterclaim alleging that Royal Trust did not give Hordo adequate support in a joint venture he alleged existed and that its withdrawal of support constituted a breach of fiduciary duty and represented oppressive behaviour. Hordo was not a shareholder until 1993 and the court concluded he purchased shares only to facilitate seeking an oppression remedy. Hordo also claimed that he was a creditor by virtue

of his counterclaim thereby entitling him to seek an oppression remedy. The court rejected this argument concluding he was at best a contingent creditor pursuing an uncertain and speculative claim for unliquidated damages against Royal Trust. Therefore the court refused to exercise its discretion to grant Hordo status as a complainant because his so-called creditor's interest in the affairs of Royal Trust were too remote.

28 Time Air argues that the applicant's position is similar to that of Hordo and that the Court should decline to use its discretion to declare that the applicant is a complainant.

29 The applicant counters this argument by contending that counsel has missed the point; that the contingent claim was in fact reduced to a judgment and as such it qualifies as a liquidated debt owing by Norcanair, albeit a revived Norcanair under the name 177078 Canada Inc. The applicant then extends its allegation of oppressive conduct to Time Air and its director Howard Cook who refused to initiate an action by Norcanair to recover the judgment debt under the indemnity clause in the agreement of December 31, 1987. The applicant contends that Time Air had knowledge of the contingent claim against Norcanair and chose to take over the assets of that company and arrange to dissolve it all at the same time knowing the claim was being litigated. It also dissolved the company using the short form method which it knew or ought to have known would mean that no one including the applicant would get notice of the move. Knowledge that the claim of the applicant was unresolved meant that Time Air and the directors of Norcanair who took part in these actions simply chose to gamble that the applicant's contingent claim would not become a judgment which converted it to a liquidated demand. In addition the applicant suggests that its subsequent refusal to bring an action in the name of the revived corporation to recover the debt from Time Air compounded its earlier oppressive and unfairly prejudicial actions against it. So the applicant argues that on the facts it is not only a creditor within the meaning of s. 241(2) of the Act but that it has shown that Time Air and Howard Cook acted in a manner which was oppressive, unfairly prejudicial and unfairly disregarded its interests at the time they dissolved Norcanair and again once it had been revived. I am inclined to agree with this line of argument.

30 That being so, can it be said the applicant qualifies as a creditor and one that had a liquidated demand at the time of the conduct complained about? From the respondents' perspective the principles applied in *Hordo* should govern. But the facts in *Hordo* can be distinguished from those surrounding the applicant's claim against Norcanair. While it was a contingent claim for damages it was based on a much better foundation than the uncertain and clearly speculative claim made by Hordo. It was a claim based on breach of contract and Time Air was made aware of it before it purchased Norcanair. In my opinion the facts of *Hordo* distinguish it from this case.

31 Notwithstanding the line of cases noted above by the respondents that seem to rule out any creditor qualifying as a complainant unless his claim is one of liquidated debt in existence at the time of the alleged misconduct, there are more recent cases which suggest the law has shifted to include contingent claimants for an unliquidated demand in the category of a creditor, only in some circumstances. These cases read together suggest that the term creditor as used in s. 241 has been expanded beyond the narrow interpretation the respondents put on it. In *G.T. Campbell & Associates Ltd. v. Hugh Carson Co.* (1979), 99 D.L.R. (3d) 529 (Ont. C.A.), for example, the court extended the meaning of the word creditor under the Ontario Act to include any claim against a dissolved corporation whether it be in debt or for unliquidated damages because to give the word "creditor" its ordinary common law meaning would restrict the claimant's ability to comply with the two-year limitation to do so (s. 226(4) in the C.B.C.A.). Here the respondent Time Air not only brought about the dissolution of Norcanair but did so in a manner which precluded notice of that process being given to the complainant. Thus, so the argument goes, it cannot now complain that it did not seriously prejudice the complainant's ability to bring an action against Norcanair pursuant to s. 226(4) of the C.B.C.A. In the *First Edmonton Place* case McDonald J. suggests that a proper person to make an application similar to the one under discussion here could include [p. 63] "a person who at the time of the ... conduct complained of was not a creditor but was a person toward whom the corporation might have a contingent liability."

32 In the *Sands Motor Hotel* case McLellan J. held that the Crown to whom the corporation owed unpaid income taxes qualified to be a "complainant" even though the amount of the claim could not be quantified (i.e. reduced to a specified liquidated amount) at the time the oppressive acts complained of occurred on the ground that the taxes are

owing when the income is received. So the definition of "creditor" was stretched to include a claimant who at the time the acts complained of occurred was unable to state the amount of the debt being claimed.

33 In *Prime Computer of Canada Ltd. v. Jeffrey* (1991), 6 O.R. (3d) 733 (Gen. Div.), the applicant did not obtain a judgment against the corporation until May 1990 for debts incurred between October 1988 and January 1989. The president of the company stripped the corporation of its cash assets making it insolvent by March 1, 1989. It ceased doing business in April, 1990. Despite the fact the applicant's claim against the corporation was not reduced to judgment until long after the debt was incurred the court held that the applicant qualified as a complainant under the Ontario *Business Corporations Act* (the wording of the appropriate sections are virtually the same as C.B.C.A.) and in that case summarily ordered the president to pay back some of the funds stripped from the corporation.

34 In my opinion the fact that the respondent Time Air had knowledge of the applicant's claim against Norcanair but chose to ignore the possibility that it would be reduced to judgment and also undertook as part of its agreement to indemnify Norcanair against such a debt placed them in a more vulnerable position than the purchaser of assets who has no knowledge of a contingent claim. Time Air then dissolved the corporation declaring it had no property and *no liabilities* which facilitated the dissolution without having to give notice to anyone let alone the applicant. Is the statement that Norcanair had *no liabilities* a totally accurate depiction of its financial status at the time? Given that the applicant's claim initially exceeded $1,000,000 one would have thought Time Air and its directors would have treated it with greater concern. It is obvious they did not believe this claim albeit a contingent claim at that point in time qualified as a liability. It does not help them to complain that the principals of Norcanair assured them there was no merit to the claim.

35 But the respondents' actions towards the applicant's claim did not stop there. Once the applicant's claim had been reduced to a judgment debt they still refused to acknowledge it as a valid judgment against Norcanair (by now called 177078) and refused at the request of the applicant to bring an action against Time Air to recover the judgment. I shall deal with some of the legal arguments advanced by Time Air to justify its refusal in a moment, but I have outlined what in my view are the circumstances which the applicant found itself in due to the actions of Time Air. Time Air's technical answer to the question of whether the applicant qualifies as a complainant is that it was not a "creditor" as defined by the Act and that the oppressive acts complained about occurred at a time when the alleged claim was both contingent and unliquidated. In my opinion that definition of "creditor" is too narrow and that argument is only partly true. I conclude that in all of the circumstances outlined the applicant is a proper person under s. 238(*d*) to make this application.

(2) Should the court grant the applicant a summary judgment against the respondents Time Air and Cook, pursuant to s. 241 of the Act?

36 The simple answer is no. I reject this request by the applicant because in my opinion an order granting a summary judgment to rectify the applicant's alleged complaint against the respondents is only available in a clear and obvious case. See, for example, *Prime Computer* case, supra. Here the applicant's remedy appears to be far more complex and may be difficult to establish since it is based on an agreement made seven years ago and which will no doubt be subject to different interpretation by the respondents than that put on it by the applicant. This is not a clear and obvious case for judgment so I must deny that method of rectifying the alleged complaint. That takes me to the third issue.

(3) Should the applicant be granted leave to commence a derivative action on behalf of 177078 Canada Inc. to rectify its alleged complaint pursuant to s. 239 of the Act?

37 This proposed remedy comes from s. 239 which reads:

> 239. (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation ... for the purpose of prosecuting ... the action on behalf of the body corporate.
>
> (2) No action may be brought ... under subsection (1) unless the court is satisfied that

(*a*) the complainant has given reasonable notice to the directors of the corporation ... of his intention to apply to the court under subsection (1) if the directors of the corporation ... do not bring, diligently prosecute ... the action;

(*b*) the complainant is acting in good faith; and

(*c*) it appears to be in the interests of the corporation ... that the action be brought ...

38 While s. 239 (subject to the criteria set down in subs. (2)) is the vehicle a complainant uses to pursue a derivative action the applicant must, of course, satisfy the court it is entitled to an order allowing it to seek rectification of its complaint of oppressive and prejudicial behaviour by Time Air and its directors for having refused to pursue its judgment against Norcanair by bringing an action against Time Air. The order is clearly discretionary and will depend upon the circumstances of each case.

39 As for the conditions precedent to any action set out in s. 239(2)(*a*), (*b*) and (*c*), it is clear that the complainant gave reasonable notice to the directors of 177078 Canada Inc. requesting it take action against Time Air and that they declined to do so. Secondly, there is no suggestion in the material filed that the applicant is not acting in good faith. As for the third criteria, is it in the interests of the corporation that the complainant be allowed to bring the action in its name, no argument was advanced before me. However, it appears there can be no real objection taken on this ground if it can be shown that the complainant is not acting in a frivolous or vexatious manner in pursuing the action. In my opinion so long as the proposed action is prima facie in the interests of the corporation and is not designed to harass and embarrass the proposed defendants then the court should facilitate the resolution of the dispute. I therefore agree with the applicant's position that it is in the interests of 177078 Canada Inc. to resolve the question of whether Time Air is liable to it under the indemnity clause of the sale of assets agreement.

40 Counsel for the respondents raise a number of other objections to granting this relief. They argue that:

41 (a) the applicant is not a "creditor" within the meaning of s. 241 because the applicant never did obtain a valid judgment against Norcanair;

42 (b) that, even if the judgment remains valid as against Norcanair, the issue to be decided is res judicata, having been raised by the applicant at the trial before Batten J. and rejected;

43 (c) that either the two-year limitation period under s. 226(4) of C.B.C.A. or the six-year limitation period under the Saskatchewan *Limitation of Actions Act*, R.S.S. 1978, c. L-15, applies to this claim;

44 (d) that the applicant should not be allowed to commence these proceedings by notice of motion.

45 I shall deal with each objection seriatim.

(a) Is the applicant a "creditor" within s. 241?

46 The respondents argue here that the applicant is not a "creditor" of Norcanair on the narrow ground that at the time it obtained its judgment Norcanair had been dissolved, i.e. as a corporation it did not exist and therefore any judgment granted by the court against it is not an enforceable liquidated claim. It follows, so the argument goes, that the applicant is not a "creditor" within s. 241.

47 The applicant points to s. 209(4) of C.B.C.A. which says:

(4) A body corporate is revived as a corporation under this Act on the date shown on the certificate of revival, and thereafter the corporation, subject to such reasonable terms as may be imposed by the Director and to the rights acquired by any person after its dissolution, has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved,

and again points out that the dissolution took place December 31, 1987 at the instance of the respondents and was revived on March 7, 1994 at the instance of the applicant.

48 The respondents contend that the liabilities of a revived corporation would only arise if the applicant's judgment had been entered after March 7, 1994. No judgment they say has been entered against 177078 Canada Inc. since that date, so despite the revival the applicant does not qualify as a creditor of Norcanair. In support of this line of argument counsel for the respondents points to *Computerized Meetings & Hotel Systems Ltd. v. Moore* (1982), 40 O.R. (2d) 88 (Div. Ct.); and *Steven Kulba Enterprises Ltd. v. Viking Investments Ltd.*, [1978] 4 W.W.R. 610 (Man. Q.B.). In my opinion neither case supports this line of argument. Those cases say that an action commenced by a dissolved corporation or an action taken against a dissolved corporation is a nullity. Here the applicant's action was commenced over two years prior to the dissolution of Norcanair. Furthermore, the respondents were well aware of it even though they appeared to be unaware of the fact the then ostensible officers of Norcanair did not disclose the dissolution until the trial was almost over. The respondents cannot now complain that the judgment eventually rendered against Norcanair was somehow unenforceable or a nullity and disqualified the applicant as a "creditor". In my view what occurred is authorized by s. 226(2)(*a*) of the Act and the judgment attached to Norcanair at the moment it was revived as 177078 Canada Inc. by virtue of s. 209(4). This objection by the respondents therefore fails.

(b) Is the issue to be decided here res judicata?

49 The respondents here refer to the application made by the applicant to add Time Air as a defendant in its action against Norcanair in July 1992 — after the judgment came down but which failed because Batten J. ruled that the applicant was not a party to the agreement between Time Air and Norcanair. The respondents argue that while the attempt to add Time Air as defendant is not precisely the remedy the applicant is seeking here, the issue surrounding the alleged oppressive conduct of the respondents towards the applicant was known by it at the time the failed application was made and should have been advanced then. It should not be allowed to litigate in instalments by seeking a different remedy now.

50 I am not inclined to adopt the argument that res judicata applies to this application. What the applicant sought to do earlier was add Time Air as a party to the judgment basing its application on the Rules of Court. It failed because the learned judge concluded the applicant was not a party to the indemnity clause in the sale of assets agreement between Time Air and Norcanair. While the applicant alleges there were acts of oppression and prejudicial behaviour committed by the respondents prior to the court application it also alleges that the directors of 177078 Canada Inc. committed oppressive acts when they refused to have it enforce the indemnity agreement with Time Air. Since Time Air is the controlling shareholder of 177078 Canada Inc. and appointed those directors it is implicated in the alleged oppression. I agree with counsel for the applicant that the issue of oppressive conduct by the respondents could not have been advanced at the date of the previous application because not all of the grounds upon which it is based were available at that time. It is the issue that the applicant now seeks to remedy and it cannot be reasonably argued, in my opinion, that the applicant should have raised it earlier.

(c) Is the applicant out of time by virtue of the two-year limitation in s. 226(4) of C.B.C.A. andlor the six-year limitation in the Saskatchewan Limitation of Actions Act?

51 Section 226(4):

> (4) Notwithstanding the dissolution of a body corporate under this Act, a shareholder to whom any of its property has been distributed is liable to any person claiming under subsection (2) to the extent of the amount received by that shareholder on such distribution, and an action to enforce such liability may be brought within two years after the date of the dissolution of the body corporate.

Does this limitation apply to the applicant's motion? I think not, because the applicant is not a shareholder to whom property of the corporation was distributed. The applicant status as a complainant comes from being a creditor seeking

to follow the assets of its judgment debtor Norcanair into the hands of its purchaser, Time Air, on the ground that the latter participated in acts oppressive or prejudicial to its interests.

52 As for the six-year limitation period under the provincial statute I agree that this limitation began to run when judgment was entered against Norcanair, i.e. 177078 Canada Inc. Up until that time it was not possible to say what amount the applicant was entitled to recover.

(d) Should the applicant have commenced these proceedings by means other than a notice of motion?

53 The respondents argue that the applicant should not be allowed to commence these proceedings by notice of motion because of the wording of s. 248 of C.B.C.A. It says that under that Act a person *may* apply in a summary matter by petition, originating notice of motion or otherwise as the Rules of Court provide. Since it does not specify "Notice of Motion" then the applicant's procedure is faulty because even if the Rules of Court permit it the statute (C.B.C.A.) takes precedence.

54 Let me first say that this argument would have much more clout had it been raised at the very beginning as a preliminary objection. To vigorously advance all of the arguments counsel for the respondents did in opposing the motion and then suggest the whole process is questionable seems to me to put the cart before the horse. Having said that I do not interpret s. 248 as requiring the applicant to use some other form of commencement process. Notice of motion is widely used in Saskatchewan to initiate the court's processes, particularly in matters which require the applicant to obtain leave of the court to initiate a proceeding against another party. That is what the applicant seeks here — an order permitting it to take a derivative action against the respondents pursuant to the C.B.C.A. At best the applicant's procedure is an irregularity which the respondents by implication waived when they so ably and vigorously opposed the remedy sought.

Conclusion

55 In general terms it is my conclusion that the applicant should be permitted to attempt the recovery of its outstanding judgments for $543,548.34 plus interest and costs by allowing it to bring a derivative action in the name of 177078 Canada Inc. against Time Air. In my opinion the applicant has been thwarted in its efforts to recover a legally established debt by the actions of both the former and the current directors and the only shareholder of this corporation. Time Air became the owner of all the assets it purchased from Norcanair with full knowledge that it may have to satisfy the applicant's claim. At the very least the applicant should be given the opportunity to prosecute its claim and let the court decide.

56 So on the basis of the foregoing, I allow the applicant's motion by concluding it qualifies as a proper person to be a complainant under Pt. XX of C.B.C.A. I also conclude that having met the criteria set out in s. 239(2) the applicant shall have leave to commence an action in the name and on behalf of 177078 Canada Inc. against the respondents, Time Air Inc. and Howard Cook, to recover the amount of the judgment debt it alleges is owing to it by 177078 Canada Inc. Finally, I direct that the applicant shall control the conduct of the said action pursuant to s. 240(*a*).

57 Costs of this application shall be costs to the applicant in any event of the outcome of the proceedings that result from this order at double the appropriate schedule.

Application allowed.

2004 CarswellOnt 2682
Ontario Court of Appeal

Stabile v. Milani Estate

2004 CarswellOnt 2682, [2004] O.J. No. 2804, 132 A.C.W.S. (3d) 477, 46 B.L.R. (3d) 294

SAM STABILE (Plaintiff / Respondent) and LUCIA MILANI, RIZMI HOLDINGS LIMITED, MUCCAPINE INVESTMENTS LTD., L.C.T. HOLDINGS INC. and HIGHLAND BEACH ESTATE HODINGS INC. and MILANI & MILANI HOLDINGS LIMITED (Defendants / Appellants)

Weiler, Sharpe, Blair JJ.A.

Heard: February 26, 2004
Judgment: June 30, 2004
Docket: CA C39376

Proceedings: reversing *Stabile v. Milani Estate* (2002), 2002 CarswellOnt 4274, 30 B.L.R. (3d) 69 (Ont. S.C.J.)

Counsel: Ronald Carr for Respondent
Charles Campbell for Appellants

***Blair J.A.*:**

Overview

1 In 1985 Sam Stabile sued Cam Milani, and two of Mr. Milani's companies, for $75,000 on a written acknowledgement of debt. That debt - which, with interest, now stands at more than $300,000 - has yet to be paid.

2 Mr. Milani died in February 1986. His estate is comprised of the shares of Milani & Milani Holdings Ltd. ("MMHL"), one of the two companies sued by Mr. Stabile.

3 Prior to Mr. Milani's death, Mr. Stabile had obtained default judgment. That judgment was subsequently set aside by Master Donkin, on motion brought by Mr. Milani's widow, Lucia Milani, the Estate Trustee and person who controls MMHL. The action then proceeded as a defended action until the eve of trial in May 1992. Neither Mrs. Milani nor the corporate defendants appeared to defend at trial, however, and on May 11, 1992, Lissaman J. granted judgment against the estate of Mr. Milani, MMHL, and another company, 473915 Ontario Inc., a subsidiary of MMHL. With accumulated interest plus costs, the judgment totalled $153,719.55. There was no appeal. Mr. Stabile attempted to collect, but discovered the defendants were judgment proof.

4 In 1997, on the basis of information subsequently learned, Mr. Stabile commenced the action in which this appeal is taken against Mrs. Milani personally, and against her companies, claiming relief - amongst other things - pursuant to the "oppression remedy" provisions of the *Ontario Business Corporations Act* R.S.O. 1990, c. B.16 (the "OBCA"). He succeeded. In 2002, Wright J. required the defendants pay him $153,719.55 which with interest amounts to $300,203.05

5 Mrs. Milani and her corporations appeal that judgment. For the reasons that follow, I would allow the appeal.

Background and History

6 Mr. Milani was a real estate developer. Generally, he bought raw land and sold developed lots, usually through his company, MMHL.

7 In 1985, Mr. Milani agreed to pay Mr. Stabile the sum of $75,000 if Mr. Stabile found him a purchaser for certain property at Keele Street and Rutherford Road in the Town of Vaughan. Mr. Stabile alleges that he did so, and that he obtained a written acknowledgement from Mr. Milani that he would be paid the $75,000. When payment was not forthcoming he sued.

The Debt Action

8 Shortly before Mr. Milani's death in February 1986, Mr. Stabile obtained default judgment. Mrs. Milani succeeded in having that default judgment set aside, however, and the action proceeded as a defended action to the date of trial. In refusing to impose terms as a condition of setting aside the default judgment, Master Donkin made the following remarks, upon which the respondents place considerable emphasis since Mrs. Milani took the position before Wright J. that the Milani Estate and MMHL were insolvent at the time of the default proceedings as a result of outstanding tax liabilities:

> In this case I have given considerable thought to whether I should impose terms. It is not long since the judgment was signed in comparison with some of the other cases. There is no evidence that the moving defendant is without assets, or attempting to get rid of its assets, although there is certainly the acknowledged fact that a sale is to go through next week and in that sale the moving defendant is the vendor. There appears to be some evidence that the defendant has some other assets and I take that from the reference to certain terms in an agreement made between the defendant and another firm of solicitors who acted as agent. . . .

9 Mrs. Milani was not closely involved with her husband's business affairs prior to his death. Although others connected with the business were aware of Mr. Milani's substantial tax liabilities, Mrs. Milani only became aware of them after his death. She continued to retain Mr. Milani's managing director, May Ann Jenkin, to look after the business, and hired a new chartered accountant, Joe Lanno, and a tax specialist, to help her in straightening out the affairs of Mr. Milani and MMHL. Although the parties cannot agree on the amount of the outstanding tax liabilities, the evidence is that they were substantial.

10 In 1991, the tax issues were settled with the federal and provincial authorities. On July 10, 1991, two of Mrs. Milani's companies, Rizmi Holdings Limited ("Rizmi") and Highland Beach Real Estate Holdings Inc. ("Highland Beach"), purchased the assets of MMHL. Rizmi acquired MMHL's Canadian properties. Highland Beach acquired lands that MMHL held in the state of Florida. These transactions were at prices approved by Revenue Canada, and it is not disputed that they were for fair market value (although the assumption of a mortgage against the Florida lands in favour of another of Mrs. Milani's companies, Muccapine Investments Ltd. ("Muccapine") as part of the purchase price, is hotly contested). All of the proceeds from the July 10, 1991 transaction were paid directly to Revenue Canada to cover tax liabilities. In spite of this the tax liabilities were not paid in full.

11 When the action was called for trial, on May 11, 1992, no one appeared for the defendants/appellants. Although she continued to maintain at the oppression remedy trial that Mr. Stabile's claim was not justified, Mrs. Milani felt in 1992 that there was no money in the Milani Estate or in MMHL to pay his claim even if he was successful. She therefore decided not to go through with the trial because MMHL had no funds even to continue the litigation. After hearing Mr. Stabile's evidence, Lissaman J. granted judgment as indicated above.

The Oppression Remedy Action

12 In the course of examining Mrs. Milani in judgment debtor proceedings, Mr. Stabile discovered that all of the assets of MMHL had been sold in the July 10, 1991 transaction in order to satisfy tax liabilities. It was not until some years later, however, that he learned the MMHL assets had been sold to companies owned by Mrs. Milani. He then

commenced this action, seeking initially to set aside the July 1991 transactions under the *Fraudulent Conveyances Act* R.S.O. 1990, c. F.29 and the *Assignment and Preferences Act* R.S.O. 1990, c. A.33, as well as claiming relief under the oppression remedy sections of the OBCA. Only the oppression remedy claim went to trial.

13 To understand the allegations underlying the oppression remedy claim, it is necessary to understand the history of certain Milani landholdings in the state of Florida.

The Florida Lands

14 Beginning in 1974, Mr. Milani acquired a number of adjoining Florida properties "in trust". The properties were shown as assets, and the development costs relating to them as liabilities, on the books of MMHL. In 1982, two of these properties were transferred from C.D. Milani "in trust" to two persons who were trustees for the Milani Family Irrevocable Trust ("MFIT"). Mr. Milani had established the trust for the benefit of Mrs. Milani and their three children. A trust deed transferring the lands was signed at that time but was not registered until several years later, when the lands were sold. I shall refer to these properties as the Trust Lands.

15 In spite of this transfer, however, the lands continued to be shown as assets on the MMHL books, and the related development costs as liabilities.

16 In 1984, the trustees of MFIT granted to a Mr. Whitely a $2.9 million option to purchase the Trust Lands. Mr. Whitely paid a deposit of $1 million, which was secured by a mortgage against the Trust Lands. This deposit, however, was paid to MMHL. When Mrs. Milani learned of this she protested. Mr. Milani assured her the $1 million would be paid over to MFIT. But it never was. The obligation was recorded on the MMHL books as an obligation to repay Mr. Whitely (or his company).

17 For reasons having to do with the inability to obtain building permits as desired, Mr. Whitely declined to proceed with his purchase of the Trust Lands. He demanded the return of his deposit, with interest, from the owner of the Trust Lands, MFIT, as under his agreement he was entitled to do. This happened prior to Mr. Milani's death in February 1986, but the situation was not resolved by that time. MFIT had no funds to pay - its only assets were the Trust Lands - and Mr. Whitely took foreclosure proceedings.

18 At this point the trustees of MFIT resigned and Mrs. Milani became the successor trustee. She took legal advice. She was also aware that the county of Palm Beach was interested in purchasing both the Trust Lands and some lots owned by MMHL across the road from the Trust Lands. The county wanted to buy both or none. To preserve this opportunity, and to buy some time to raise financing and clear title to the Trust Lands, Mrs. Milani caused MFIT to be "put into Chapter 11". She needed $1,261,078.34 to pay off the Whitely loan, plus $451,022.00 to retire the first mortgage to the Florida National Bank, plus additional expenses relating to the transaction and the default, for a total of $1,934,237.00 (U.S.).

19 Mrs. Milani raised $1.4 million of these required funds through a loan from the Flagler National Bank on the security of the Trust Lands. The balance of $534,237 she advanced from her own company, the defendant Muccapine. The Muccapine advance was secured by way of a mortgage on both the Trust Lands and the assets of MMHL. The mortgage bore a high late-1980's interest rate for subsequent encumbrances of 20% per annum (24% after maturity), but the rate and terms were similar to other subsequent encumbrances registered against other MMHL lands. Mrs. Milani testified that Muccapine took a mortgage against the MMHL lands as well as the Trust Lands because it was MMHL that had received the $1 million deposit monies in the first place.

20 The next year, 1987, Mrs. Milani successfully negotiated the sale of the Trust Lands plus the MMHL lots across the road to the county of Palm Beach. MMHL earned a profit from the sale of its lots. The Flagler National Bank mortgage on the Trust Lands was discharged from the sale proceeds, and $600,000 (U.S.) was paid to Muccapine. This left a balance of $73,399 owing to Muccapine. The Muccapine mortgage on the Trust Lands was discharged - those lands had been sold to the county - but it remained against the MMHL assets.

The Taxation Problem and Resolution

21 Mr. Milani and MMHL were subject to significant tax liabilities in the period prior to his death. Indeed, Revenue Canada had a substantial lien registered against the MMHL lands at Keele St. and Rutherford Rd. that were the subject matter of the transaction giving rise to Mr. Stabile's $75,000 claim. It is acknowledged, however, that Mr. Milani was a private individual when it came to his business affairs, and Mrs. Milani did not become aware of the tax difficulties until she began to attempt to unravel those affairs following her husband's death.

22 The July 10, 1991 transaction was the result of a settlement with the taxing authorities. In substance the transaction involved the purchase by Rizmi of MMHL's Canadian properties and the purchase by Highland Beach of MMHL's Florida properties, for fair market value, and the payment by MMHL of the proceeds of those purchases to the taxing authorities. Releases executed by both the Crown in right of Canada and the Crown in right of Ontario specifically accept that the prices paid for the MMHL properties "are equal to the respective fair market values of each of the Properties." This followed the preparation of appraisals of the properties, the amounts of which are not in dispute. The Crown agreed to make no claims to the properties conveyed and released and discharged Mrs. Milani, the various companies and others from any claims arising in connection with the liability of the Milani Estate and of MMHL for taxes, interest and penalties.

23 Mr. Stabile does not dispute that the properties were sold for fair market value. However, he takes issue with the fact that part of the purchase price of two of the Florida properties acquired by Highland Beach was satisfied by way of assumption of the Muccapine mortgage. One property was purchased for $675,000, of which $389,752.41 was accounted for by the Muccapine mortgage. The other was purchased for $253,000, of which $146,084.99 was attributable to assumption of the Muccapine mortgage.

24 The parties do not agree on the amount of the outstanding tax liabilities of the Milani Estate and MMHL. The trial judge accepted a letter from Revenue Canada dated November 7, 1986 indicating the tax liability of MMHL at $532,085.80 and that of the Estate at $1,556,469.52, for a total of $2,088,55.32. The appellants' accountant, Joe Lanno, testified that these amounts did not include taxes owing to provincial authorities and that there were errors in the calculations of MMHL's previous accountants concerning the company's net tax liability. He stated that MMHL's total tax liability at the end of 1986 was $2,384,129.00, bringing the total taxes owed by the Estate and MMHL to $3,940,598.52. He was not cross-examined on this. The trial judge acknowledged the appellants' assertions in this regard, but observed that they made the allegations "without confirmation from the tax authorities". In any event, Mr. Carr concedes there were tax liabilities remaining that exceeded the amounts paid by Rizmi and Highland Beach for the MMHL assets in the July 10, 1991 transaction. At that time, the taxing authorities would have had priority over Mr. Stabile and other creditors with respect to any additional amounts paid even if the transactions had yielded a higher purchase price.

Other Advances by Mrs. Milani's Companies to MMHL

25 The evidence is that between 1987 and 1991 the expenses of MMHL were paid out of an account in the name of "Lucia Milani in trust" which was funded entirely by monies received primarily from Mrs. Milani's companies, the defendants Rizmi, L.C.T. Holdings Inc., and Muccapine. The advances were evidenced by promissory notes.

26 Mr. Lanno testified that in addition to the advances forming the subject of the Muccapine mortgage, Muccapine paid additional funds to MMHL. The Muccapine ledgers show further advances of $250,887 plus accumulated interest of $254,948. As a result, the total amounts owing by MMHL to Muccapine on all outstanding loans and mortgages in 1991 was $741,347. From this amount Mr. Lanno deducted the credits given to Rizmi and Highland Beach when they purchased the MMHL properties on July 10, 1991, by way of assumption of the Muccapine mortgage. MMHL was still indebted to Muccapine in the amount of $34,132.

27 After examining the books and records of MMHL, Mr. Lanno decided that the books and records and financial statements needed to be restated to reflect the fact that the Trust Lands were MFIT assets. He did this by making a number of entries in the books and records of MMHL and MFIT, and by preparing a set of statements for MFIT. No statements had previously been prepared for MFIT, as none were required. This work was completed in 1989. As a result, the reconstituted financial records of MMHL and MFIT show the Trust Lands as assets of MFIT, and the obligation to repay the Whitely deposit as an obligation of MFIT. In addition, the development costs respecting the Trust Lands, which had been charged against MMHL, were transferred to MFIT and shown as a liability of MFIT to MMHL.

28 Mr. Lanno did not alter the financial statements to show a liability on the part of MMHL to repay the $1 million Whitley deposit to MFIT or a receivable in favour of MFIT from MMHL. He testified that he was not told by Mrs. Milani or Ms. Jenkin that the $1 million had been paid to MMHL when it was received from Mr. Whitley.

The Trial Judge's Decision

29 The trial judge concluded that Mr. Stabile "had a reasonable expectation that the affairs of MMHL would be conducted with a view to protecting his interests", referencing this court's decision in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.), at p. 177. This conclusion was based primarily on the fact that Master Donkin had refused to impose terms when setting aside the default judgment obtained by Mr. Stabile prior to Mr. Milani's death on the basis that "[t]here [was] no evidence that [MMHL] is without assets, or attempting to get rid of assets" and that "[t]here appears to be ...evidence that [it] has some other assets." He observed that if MMHL was insolvent at the time of the default proceedings, as Mrs. Milani now claimed, that information was withheld from the master. The trial judge felt that MMHL must have had sufficient assets at the time to satisfy Mr. Milani's claim, otherwise, it would not have gone to the expense of setting aside the default judgment.

30 The trial judge also decided that the July 10, 1991 transaction had the result of transferring all of MMHL's assets to companies controlled by Mrs. Milani and that the price for those properties was inappropriately reduced by the assumption of the Muccapine mortgage as part of the purchase. He found that the Muccapine mortgage should not have been registered against the MMHL lands "because the MFIT was solely responsible for the repayment of the Whitley mortgage and the loan from Florida National", and that MMHL should not have been charged with the interest on the Muccapine mortgage. The registration of the Muccapine mortgage benefited Mrs. Milani and her companies to the detriment of other creditors of MMHL, including Mr. Stabile. The charge of interest on the Muccapine mortgage to MMHL rather than to MFIT (of which Mrs. Milani and her children are beneficiaries) diminished the assets of MMHL available to other creditors, as did the artificial reduction of the purchase price of the properties by the assumption of that mortgage. As a result, the trial judge found "that the effect of the July 10, 1991, transaction transferring the assets of MMHL to Lucia and her companies benefited the defendants to the detriment of the plaintiff creditor". This constituted oppression, he concluded, and the proper relief was to grant Mr. Stabile judgment against all defendants for the amount of his judgment ($153,719.55) plus interest, which he fixed at 9% from the date of judgment, plus costs.

The Standard of Review

31 The standard of review from the decision of a trial judge on a question of law is correctness. The standard of review on a question of fact, or of mixed fact and law, is that of palpable or overriding error. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), at 256; *Waxman v. Waxman*, [2004] O.J. No. 1765 (Ont. C.A.) .

The Statutory Framework

32 Although the action was originally framed as a claim for relief under the *Fraudulent Conveyances Act* and the *Assignment and Preferences Act*, as well as for relief under the OBCA, only the oppression remedy claim proceeded to trial.

33 Section 248 of the OBCA provides:

(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

Analysis

34 In my view, respectfully, the trial judge erred in three significant respects in arriving at his decision.

35 First, his conclusion that the Muccapine meeting should not have been registered against the MMHL lands and that MMHL should not have been charged with the interest due on it is wrong, and flows from a misapprehension of the evidence. Secondly, this conclusion was central to the trial judge's finding that the July 10, 1991 transaction benefited Mrs. Milani's companies to the detriment of creditors, including Stabile, and was therefore oppressive. That finding is therefore flawed. Thirdly, the finding is flawed in law because it (a) is based on a "reasonable expectation" of Mr. Stabile that is cast too broadly, and (b) fails to recognize that a simple benefit/detriment analysis is not sufficient to establish "oppression" pursuant to s. 248 of the OBCA, which requires that the impugned conduct must be conduct that is "oppressive, or *unfairly* prejudicial to or that *unfairly* disregards the interests of" the claimant. That was not the case here.

36 There was every justification for the Muccapine mortgage being placed against the assets of MMHL, in my view. The Muccapine monies were advanced as part of a refinancing package that led to the repayment of the Whitley deposit of $1 million. MMHL alone had received those monies and had the use of them. Although secured by the Trust Lands - which should have been carried as an asset of MFIT, but were not -those monies were never properly a debt of MFIT. Rather, they were a debt of MMHL and their repayment was at all times an obligation of MMHL. The respondent's own accounting expert, Ronald Smith, agreed that there was nothing wrong with Muccapine obtaining security against the MMHL assets, on the assumption that MMHL got the $1 million and given that the monies were advanced as part of a pot of money to pay off that debt and other expenses. These assumptions were established on the evidence. Mr. Smith agreed as well that it was not improper for MMHL to pay interest on the mortgage, given those assumptions.

37 The trial judge made no reference to Mr. Smith's evidence. His conclusion that "the Muccapine mortgage should not have been registered against the MMHL lands and MMHL should not have been charged with the interest on the Muccapine mortgage" was based on his view that the $1.9 million raised from the Flagler National Bank and Muccapine "went to and for the benefit of the MFIT *because the MFIT was solely responsible for the repayment of the Whitley mortgage* and the loan from Florida National" [emphasis added]. With respect, this view was contrary to the evidence. MMHL was responsible for the repayment of the Whitley mortgage because MMHL had received and used the monies.

38 Consequently, the assets of MMHL were appropriately charged with the Muccapine mortgage, and with the payment of interest on that mortgage, representing, as it did, monies raised to defray at least a portion of the Whitley debt.

39 I observe as well that MMHL was only charged with an amount equal to less than half the amount of the Whitley loan plus interest. MMHL therefore benefited significantly from the Whitley loan and its repayment - as did its creditors,

such as Mr. Stabile, therefore - by only assuming responsibility for one-half of the monies it received and for one-half of the interest payable on those monies.

40 The fact that the Muccapine mortgage was left on the MMHL assets but discharged as against the MFIT Trust Lands at the time of the conveyance to the county of Palm Beach is explained in this context as well. First, the Trust Lands had been sold to the county. Title to them therefore had to be cleared and the Muccapine mortgage could not remain. All the sale proceeds were expended to pay outstanding encumbrances and other expenses, and on the evidence MFIT does not appear to have had any other assets than the Trust Lands. Secondly, to the extent that the Muccapine mortgage provided security for repayment of the Whitley loan - in reality the sole obligation of MMHL - and a balance remained outstanding on the payment of principal and interest on that mortgage after distribution of the sale proceeds, the mortgage properly remained registered against the MMHL assets.

41 The foregoing misconception regarding the placement of the Muccapine mortgage against the MMHL assets undermines the trial judge's ultimate finding that "the effect of the July 10, 1991, transaction transferring the assets of MMHL to Lucia and her companies benefited the defendants to the detriment of the plaintiff creditor", and was therefore oppressive. In making that finding the trial judge stated (reasons, para. 37):

> The registration of the Muccapine mortgage benefited Lucia or companies controlled by her to the detriment of the creditors of MMHL including the plaintiff. Lucia was a beneficiary of the MFIT and to the extent a party other than the MFIT was charged with the interest on the Muccapine mortgage, the trust and, indirectly, its beneficiaries were better off. The charge of interest on the Muccapine mortgage of $602,945 diminished the assets available to the creditors of MMHL by like amount. In addition, when Highland Beach bought the Florida East and Florida West properties from MMHL in July 1991, the balance due on closing was artificially reduced by the balance of the Muccapine mortgage against those lands, $389,752.41 and $146,084.99. *Lucia and her companies paid MMHL less for these lands because these lands should not have been burdened by the Muccapine mortgage. Lucia arranged to have MMHL incur a liability that should only have been incurred by the MFIT* [emphasis added].

42 The evidence, in fact, is to the contrary. MFIT was made to incur a liability *that should only have been incurred by MMHL*. Thus, the interest was properly chargeable to MMHL and did not represent an inappropriate diversion of obligations from MFIT to MMHL. Moreover, since the Muccapine mortgage constituted a legitimate charge against the assets of MMHL, and a real debt, its assumption by Highland Beach, as part of the purchase price in the July 10, 1991 transaction, amounted to the assumption of a real obligation and not a reduction in the purchase price, as the trial judge held. There has been no suggestion that Muccapine is willing to waive its rights to payment under the mortgage; nor is their any explanation as to how - if that were so - the abandonment of such a valuable asset is a benefit to Mrs. Milani and Muccapine. There was therefore no "benefit" to Highland Beach in this regard as the trial judge concluded.

43 In applying the oppression remedy provisions of the OBCA the trial judge relied upon the following passage from the decision of this court in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.), at 177:

> In our view, the trial judge failed to appreciate that the "oppressive" conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the plaintiff. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

44 It is not contended here that the impugned conduct on the part of Mrs. Milani and her companies was done with the intention of harming the respondent. Nor is it argued that the lack of such intention precludes a finding of oppression. Drawing upon the foregoing passage, however, the trial judge held that Mr. Stabile had a reasonable expectation, following the setting aside of his default judgment in July 1986, "that the affairs of [MMHL] would be conducted with a view to protecting his interests." Given his conclusion that the obligations of the Muccapine mortgage had been improperly shifted from MFIT to MMHL, and that the effect of the July 10, 1991 transaction was therefore

to denude MMHL of assets that would otherwise have been available to the company's creditors, including Mr. Stabile, this reasonable expectation had been breached. Application of the oppression remedy followed.

45 Mr. Carr conceded in argument that but for the facts surrounding the default judgment, Mr. Stabile would not have had a reasonable expectation that he would be paid. The trial judge placed some emphasis on this point as well. In my view, however, the trial judge's characterization casts the "reasonable expectations" component of oppression under s. 248 of the OBCA too broadly in the circumstances of this case. Moreover, Mr. Stabile's reliance, and that of the trial judge, on the assumption that the master might have imposed conditions upon the setting aside of the default judgment in the form of some form of "security" for the payment of an eventual judgment, had he known about the alleged insolvency of MMHL at the time, is misplaced.

46 Once the default had been set aside, Mr. Stabile was not a judgment creditor. His status was that of a contingent claimant asserting a claim for a liquidated demand against MMHL and the Milani Estate. His position was not analogous to that of a minority shareholder, or of a major lender who might be said to have "some particular legitimate interest in the manner in which the affairs of the company are managed": see *Daon Development Corp., Re* (1984), 54 B.C.L.R. 235 (B.C. S.C.), at 243. His interest and concern were simply those of any remote potential judgment creditor whose potential debtor has exigible assets. He had a reasonable expectation that the affairs of the potential debtor corporation would be conducted honestly and in good faith, based on the reasonable business judgment of its directing minds, and in a manner that did not *unfairly* prejudice or affect his interests. He had no reasonable expectation that MMHL would be managed and operated in a way that would ensure he was paid for his debt (assuming it was established at trial) in priority to others, including the Crown for tax liabilities.

47 The above-cited quotation from *Downtown Eatery* must be considered in the context of the remarks that follow it. Not every conduct that has *the effect* of harming a complainant gives rise to recovery under s. 248(2). The conduct must of course fall foul of the reasonable expectations of the complainant according to the arrangements existing between the principals: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.) . Moreover, s. 248(2) makes it clear that the oppression remedy involves conduct that effects a result that is "oppressive", or that "*unfairly* prejudices" the complainant, or that "*unfairly* disregards the interests of" the complainant. See *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div. [Commercial List]), varied on other grounds (1998), 40 O.R. (3d) 563 (Ont. C.A.); *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.).

48 In *First Edmonton Place*, McDonald J. reviewed the authorities that have considered the meaning of these words. At p. 143 he said:

> Three cases merit discussion for their attempts to define the key terms of the legislation. In *Scottish Co-operative Wholesale Society v. Mayer*, [1959] A.C. 324, at p. 342, Viscount Simmonds defined "oppressive" as "burdensome, harsh and wrongful". Numerous cases have subsequently quoted and adopted this definition (see Re National Building Maintenance [1971] 1 W.W.R. 9 (B.C.S.C.), at 21; Re Cucci's Restaurant (1985) 29 B.L.R. 3 (Alta. Q.B.) at 202). In *Diligenti v. R.W.M.D. Operations Kelowna* (1976) 1 B.C.L.R. 36 S.C., at 45, the court considered the meaning of "unfairly prejudicial". Fulton J. ruled that in adding the words "unfairly prejudicial" to the statute, the legislature must have intended that the courts would give those words "an effect different from and going beyond that given to the word oppressive". Turning to the Oxford Dictionary, he found that "prejudicial" meant detrimental or damaging to the applicant's right or interest and "unfair" meant inequitable or unjust. He concluded that "the dictionary's definition supported the instinctive reactions that what is unjust and inequitable is obviously unfairly prejudicial" (at 46). Finally, in *Stech v. Davies*, supra, at p. 379, Egbert J. defined "unfairly disregard" as "to unjustly or without cause, in the context of s. 234(2), pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation.

49 The trial judge asked himself the proper question. At para. 16 of his reasons he said: "[t]he issue to be decided is whether the July 10, 1991 transaction had the effect of unfairly prejudicing or unfairly disregarding the interests of the plaintiff creditor". The question he answered, however - see para. 38 of his reasons - was whether the effect of that

transaction in transferring the assets of MMHL to Lucia and her companies benefited the appellants to the detriment of the respondent creditor. As demonstrated above, more than a simple benefits/detriment analysis is required under s. 248(2) of the OBCA. The impugned conduct may effect a result that is "harmful" to the complainant, in the sense that he is unable to collect on his judgment debt. More is required, however. The conduct must effect a result that is "oppressive" or "unfairly prejudicial" to, or that "unfairly disregards" the interests of the complainant.

50 Once the misconception regarding the Muccapine mortgage is corrected, there is nothing in the circumstances of this case to justify a finding that the July 10, 1991 transaction effected a result that was "oppressive" or "unfairly prejudicial" to, or that "unfairly disregards" the interests of the complainant. There is no suggestion that Mrs. Milani or any of her companies acted dishonestly or in bad faith. The trial judge wondered why MMHL was kept operating between 1986 and 1991, given its "grim financial picture". Mrs. Milani apparently exercised her best business judgment in that regard, however. She kept it operating - through funding from her own companies - in order to preserve the assets from foreclosure, maximize their value where possible, honour mortgage and development obligations, and attempt to resolve the overriding tax exposure of the Milani Estate and Mr. Milani's companies. None of this constituted oppressive conduct in relation to Mr. Stabile.

51 Finally, even if the master had ordered the Milani group to pay monies into court as a term of lifting the earlier default judgment, Mr. Stabile could not have had a reasonable expectation that his judgment - if he obtained one - would be secured in the event that MMHL became insolvent. Monies paid into court in such circumstances do not place a plaintiff in the same position as a secured creditor; rather, in the event of bankruptcy, they are payable to the trustee to be distributed to creditors in accordance with their claims to priority. As Carruthers J. noted in *Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.* (1995), 33 C.B.R. (3d) 244 (Ont. Gen. Div.), at para. 19, "it would be an anomaly if the plaintiff, prior to judgment, was given a greater right to the money in court than it would have following the judgment". This decision was upheld on appeal: (1997), 43 C.B.R. (3d) 135 (Ont. C.A.).

52 I do not understand, therefore, how Mr. Stabile would have been in a better position on the theory that the master would have imposed conditions upon setting aside the default judgment had MMHL been insolvent at that time and had the master been made aware of that state of affairs. If he would not have been in a better position at the time his judgment was obtained, in 1992, then I fail to comprehend how the failure of the master to impose terms could have created a "reasonable expectation" that the affairs of MMHL would be conducted in such a way that he would be assured such would be the case.

Conclusion

53 While the palpable and overriding standard demands strong appellate deference to findings of fact and to inferences drawn from those facts (see *Waxman*, *supra*, paras. 292 and 300), I am satisfied the standard has been met on this appeal. Once the trial judge's misconception of the evidence is rectified, his determinations regarding (i) the wrongful placement of the Muccapine mortgage against the assets of MMHL, (ii) the effect of the July 10 1991 transaction, and (iii) the reasonable expectations of Mr. Stabile, are "palpably" in error, in the sense they are "obvious, plain to see or clear" (*Waxman*, para 296; *Housen*, p. 246). In addition they constitute an "overriding" error because they go to the root of the trial judge's determination and are thus "sufficiently significant to vitiate the challenged finding[s]" (*Waxman*, para 297). The conclusion respecting the reasonable expectations of Mr. Stabile was also flawed in law, for the reasons explained above.

54 For these reasons, the finding of oppression cannot be sustained in the circumstances of this case and the appeal must be allowed.

Disposition

55 The appeal is allowed, the judgment of Wright J. dated December 10, 2002 is set aside, and judgment is granted dismissing the action.

56 The appellant is entitled to the costs of the appeal, fixed in the amount of $15,000, inclusive of fees, disbursements and GST. This cost award reflects the fact that the appellant has been successful on this appeal, but was unsuccessful on a less time-consuming but companion appeal respecting the order of Molloy J. The appellant is also entitled to the costs of the trial, on a partial indemnity basis, to be assessed.

***Weiler J.A.*:**

I agree.

***Sharpe J.A.*:**

I agree.

Appeal allowed.

2004 CarswellOnt 4263
Ont. S.C.J. [Commercial List]

Levy-Russell Ltd. v. Shieldings Inc.

2004 CarswellOnt 4263, [2004] O.J. No. 4291, [2004] O.T.C. 907, 134 A.C.W.S. (3d) 610, 48 B.L.R. (3d) 28

LEVY-RUSSELL LIMITED and LEVY INDUSTRIES LIMITED (Plaintiffs) and SHIELDINGS INCORPORATED, THE BANK OF NOVA SCOTIA, COOPERS LYBRAND LIMITED, and STANLEY DENNIS NORMAN BELCHER (Defendants)

Cumming J.

Heard: January 12-15, 19-22, 26, 28, 30, 2004; February 2-5, 9, 11-12, 24, 2004; April 1, 2004
Judgment: October 22, 2004
Docket: 97-BK-000004

Counsel: Chris G. Palaire, John K. Phillips for Plaintiffs
Pete F.C. Howard, Christopher J. Cosgriffe, Timothy M. Banks for Defendants, The Bank of Nova Scotia, Coopers & Lybrand Limited, Stanley Dennis Norman Belcher

***Cumming J.*:**

Background

1 The plaintiffs, Levy-Russell Limited ("LRL") and Levy Industries Limited ("LIL") (collectively referred to as "Levy") commenced action no. 29272/88 June 10, 1988 in this Court against, *inter alia*, Shieldings Incorporated ("Shieldings"). Shieldings had purchased the assets of a corporation, Tecmotiv Inc. ("Tecmotiv"), owned by Levy.

2 That action (which can be called the "Tecmotiv action"), alleging a civil conspiracy, resulted in a 71 day trial which concluded April 29, 1993. Reasons for Decision of Mr. Justice G. Dennis Lane, comprising 405 pages, were released April 5, 1994. See *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1, 54 C.P.R. (3d) 161 (Ont. Gen. Div.). Judgment in the amount of $5,261,000.00 plus costs was given in favour of Levy against the defendants Tecmotiv Inc., Kenneth Foreht, Ronald Bradshaw, Morton Krestell, Terrence Godsall ("Godsall") and Shieldings. The formal judgment was signed May 30, 1994 and entered June 21, 1994.

3 The appeal period for Levy's judgment expired. The judgment remains unpaid in its entirety and, with interest, now amounts to more than $12,400,000.00. Therefore, Levy has been a judgment creditor of Shieldings since 1994.

4 Levy can be referred to as having had the status of a 'contingent judgment creditor' of Shieldings from the inception of the litigation it commenced in 1988 against Shieldings until Levy obtained judgment in 1994. Levy then became an actual judgment creditor of Shieldings.

5 Mr. Justice Lane held that three of Levy's own directors, Messrs. Foreht, Bradshaw and Krestall, conspired with Mr. Godsall, an officer of Shieldings, to breach their fiduciary duties to Levy and to arrange matters so that, in concert with Shieldings, the Levy business could be purchased from the receiver of Levy at less than fair value. (Parenthetically, it is noted that evidence in the case at hand indicates Shieldings ultimately lost an estimated $10.95 million on the Tecmotiv acquisition.)

6 Levy's business has been inactive since at least 1992. There is common ground that Levy has no assets of any value other than the alleged claim brought in the action at hand.

Introduction to the Action at hand

7 Levy's 58 page claim in the action at hand, Amended Fresh As Amended Statement of Claim, Court file no. 97-BK-000004 ref. B299/94 includes as defendants, Shieldings, The Bank of Nova Scotia ("BNS" or "the Bank"), Coopers & Lybrand Limited ("Coopers") and Stanley Dennis Norman Belcher ("Belcher"), a director of Shieldings and a Vice President of BNS. The action is now pursued against only the above-named four of the original 17 defendants. Extensive allegations are made.

8 Shieldings made no appearance in this action and was noted in default. There is common ground between the parties that if Levy is successful against BNS and/or Mr. Belcher that judgment is also to be entered against Shieldings. The Receiver of Shieldings, Coopers, has been added as a party because of consequential relief that would follow if Levy is successful against the other parties.

9 The action at hand is an oppression action brought under ss. 245 and 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"*).* In brief, Levy brings this action as a complainant alleging that the business and affairs of Shieldings were carried on in a manner that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of Levy. The claim alleges that the evidence supports the inference that BNS had *de facto* control of Shieldings such that the Bank caused Shieldings to embark upon a course of action whereby BNS gained a preferential and unfair position over Levy as an unsecured creditor.

10 BNS has worn two hats in its relationship with Shieldings: BNS has been a major (but not controlling) shareholder and BNS has been the major lender to Shieldings.

The Issues

11 This case raises a contest between the asserted rights of a *contingent* unsecured judgment creditor (Levy) vis-à-vis Shieldings and the rights of another, pre-existing creditor of Shieldings, being BNS. Levy seeks to utilize the oppression remedy against the pre-existing creditor Bank because Levy, the *contingent* judgment creditor, successfully obtained a final judgment but has been unable to realize upon that judgment. There are only two major creditors of Shieldings, being BNS and Levy.

12 Levy claims that BNS and Shieldings purportedly converted unsecured debt to secured debt to the advantage of BNS and to the corresponding disadvantage of Levy. Levy says that at worst it ranks *pari passu* with BNS as unsecured creditors. Indeed, Levy submits that given the Bank's oppression the BNS claim against Shieldings should be subordinated to the unsecured claim of Levy. The main allegation of the claim is that about September 13, 1993 BNS achieved its asserted favourable position through a $35.5 million bridge loan which was repaid within four days. At that time, BNS required Shieldings to provide security in respect of other, existing unsecured loans.

History of Shieldings

13 In 1986 Mr. Beverly G. "Bud" Willis, then a Vice President of investment dealer Richardson Greenshields, left that company, together with Mr. Godsall, to acquire and operate Shieldings, as a venture capital corporation.

14 By about mid-1986 Shieldings had raised some $15 million in equity capital from six institutional investors, including $5 million from BNS.

15 Shieldings would proceed over time to provide venture capital by way of debt and equity financing to some 30 start-up companies in various geographic and industrial segments. Shieldings invested in companies considered by management to represent under-valued situations in view of their asset base or earnings potential. Shieldings sought to provide long-term planning, financial and management assistance to the companies so as to add value to the businesses.

16 BNS was the banker for Shieldings, being a substantial lender. At the same time, BNS was also a substantial equity investor. BNS has been both a creditor and shareholder of Shieldings at all relevant times.

17 BNS (with 9.1% of the voting shares and 31.7% of the equity), along with six institutional investors, being Dofasco Employees Savings Fund, Canada Life Assurance Co., CP Pension Plan, Ontario Hydro Pension Plan, Claridge (Pentrust Holdings) and Ontario Hydro Pension Fund (together with individuals comprising management) were the shareholders of Shieldings upon its organization in 1986. A seventh institutional investor, Dofasco Profit Sharing Fund, would later become a shareholder. By September, 1993 BNS had invested some $22.1 million, or 38.1% of the total of $58.8 million comprising the then five classes of shares.

18 Management at the inception of Shieldings included Mr. Bud Willis as the 'driving force,' who was President, and Mr. Godsall as Vice-president.

19 There were initially six, and later seven, directors of Shieldings. Each of the institutional investors (except for Dofasco), together with management, nominated a director. Mr. Belcher, Senior Vice President of BNS, was appointed as the single BNS nominee to the Shieldings' board of directors. Although a quorum required the Bank's nominee and management's nominee to be present, the Bank had only one vote.

20 A resolution of five members of the Board (less any members declaring a conflict of intent) was required for certain actions, including the encumbering of an asset by Shieldings, except in respect of providing funds for its acquisition.

21 After the death of Mr. Willis in 1991, Messrs. Gil Bennett, David R. G. Tanner and Michael Trites became part of the management of Shieldings. Mr. Bennett became Chairman and Chief Executive Officer and Mr. Godsall became President.

Shieldings' Venture Capital Investments

22 Three major venture capital investments of Shieldings included an interest in each of Comcor Waste Systems Ltd. ("Comcor"), Versatile Pacific Shipyards Inc. ("Versatile") and Brenda Bay Timber Company Limited ("Brenda Bay").

Comcor Waste Systems Ltd. ("Comcor")

23 Comcor, through a subsidiary, Comcor Waste Systems Ltd., purchased a substantial interest in a corporation, Reclamation Systems Inc., which owned a one-third interest in a quarry acquired in March, 1987, in Acton, Ontario. Comcor sought to convert this quarry into a landfill site. The objective was to provide a very significant destination for treated garbage from the Toronto area.

24 The Comcor venture required a licence from government regulatory authorities after an extensive environmental review process. The operating capital required by Shieldings for this intended development was obtained in March, 1990, through some $19.5 million in Comcor convertible debentures acquired by the institutional investors of Shieldings, including BNS who advanced $7,200,000.00. Shieldings provided an unsecured guarantee to the debenture holders in respect of Comcor's indebtedness to them.

25 Thus, BNS came to have four separate interests in respect of Shieldings; it was a secured creditor of Shieldings as a direct lender; it was an unsecured creditor as a direct lender to Shieldings; it was an unsecured creditor of Shieldings as a lender to Comcor because of the unsecured guarantee provided in respect of the Comcor debentures; and it was an equity investor as a minority shareholder of Shieldings.

26 On June 23, 1994 a private members' bill moved by the member for the electoral riding where the Comcor quarry was located was enacted in the Legislature, becoming the *Environmental Protection Amendment Act (Niagara Escarpment), 1994*, S.O. 1994, c. 5 ("*Comcor Act*"). This legislation was specifically targeted at the Comcor project. It effectively

prevented the quarry being converted to a garbage disposal landfill site as intended. The Comcor project was then at an end. The Comcor investment was rendered valueless to Shieldings.

27 The business plan of Shieldings Incorporated was not achieved. With the passage of the *Comcor Act*, there was no prospect of a return to shareholders. The liabilities of Shieldings exceeded management's estimation of the value of its assets.

28 Shieldings' management may have been naïve in assessing the risk of political intervention in respect of the Comcor venture. However, Shieldings' management understood that the Government of then Premier Bob Rae would allow the environmental review process to proceed to completion and the merits of the project determined by the pertinent regulatory agencies. Shieldings was unsuccessful in litigation against the provincial Government. See *Reclamation Systems Inc. v. Ontario* (1996), 27 O.R. (3d) 419 (Ont. Gen. Div.). If the project had received the regulatory approvals and proceeded forward to fruition, Shieldings would have had a major financial success.

29 There is no credible basis to suggest that Shieldings was approaching insolvency until the point in time of the passage of the legislation relating to Comcor. See generally *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (Ont. S.C.J. [Commercial List]), at 667. As a memo dated February 1, 1993 of Mr. Belcher to a Bank officer stated, Shieldings' shareholders (including the Bank) were prepared to continue funding Shielding's operating expenses, including the interest on its secured debt, being confident at the time of Shieldings' ability to realize a significant profit upon its Comcor investment.

30 As stated above, the Levy judgment in the Tecmotiv action against Shieldings was delivered by Lane J. April 5, 1994. Shieldings attempted to negotiate a settlement of the judgment but was unsuccessful. Given the collapse of the Comcor venture in late June, 1994, Shieldings became insolvent. BNS appointed Coopers as Receiver of Shieldings September 13, 1994. The assets of Shieldings were subsequently realized, the asset dispositions being approved by several Court Orders. Levy challenged some of the asset sales as being improvident, without success.

31 The loss of BNS as a *lender* to Shieldings is at a minimum $22.5 million and may ultimately be as much as $48 million (depending upon the ultimate realization of distress preferred shares the Bank received in respect of a disposition of the so-called "North Vancouver Lands" of Shieldings, discussed below). BNS has also lost its entire equity contribution of more than $26 million.

32 At the time of Shielding's insolvency, being June 23, 1994, with the demise of the Comcor project, Levy was a *contingent* unsecured creditor of Shieldings (given that the judgment in the Tecmotiv action was entered only June 21, 1994 and the right to appeal to appeal the decision of Lane J. was then alive) and later became an unsecured judgment creditor.

Versatile Pacific Shipyards Inc. ("Versatile")

33 Until 1989, Shieldings had entered into a number of relatively small investments with no investment in excess of about $7 million. Management of Shieldings then identified what it considered to be a major opportunity, the acquisition of Versatile Pacific Shipyards in British Columbia. This transaction in June, 1989 resulted in a subsidiary of Shieldings, 379186 B.C. Limited ("#379"), purchasing the shares of Versatile Pacific Shipyards Inc. ("Versatile") (later known as "Yarrows Limited"), which engaged in shipyard operations on Vancouver Island at Esquimault with ship-building and ship-repairing, and purchasing through a second subsidiary, 366466 B.C. Ltd. ("#366"), a property consisting of 18.6 acres, referred to as the "North Vancouver lands."

34 To fund Shieldings' acquisition of Versatile, BNS had made a loan of some $32 million. This intended short-term loan was to be repaid within four months, that is, by October 29, 1989. Management had advised the board of Shieldings at the time of the acquisition that there was a commitment by a third party to purchase the Esquimault property for $9 million and by a second third party to purchase 75% of the North Vancouver lands for some $24 million.

35 The Versatile transaction included a loan to #366 to enable it to purchase the North Vancouver lands as part of the overall acquisition of Versatile. The #366 loan was secured by the land owned by #366, by a demand debenture of #366 and unlimited guarantees provided by #379, and by Shieldings itself. The unlimited guarantee of Shieldings in respect of its subsidiaries indebtedness, (supported by the hypothecation of various shares and notes of investee companies), initially unsecured in 1989, later became secured by a continuing $85 million demand debenture dated September 10, 1993 in connection with the Brenda Bay transaction, discussed below. There was no cross-collateralization of security until the 1993 demand debenture.

36 As part of the consideration for the loan from BNS, Shieldings also provided an undertaking, *inter alia*, that it would not dispose of any assets in excess of $250,000.00 unless the entire proceeds of any such sale were paid to BNS to reduce its loan in support of the Versatile acquisition.

37 Shieldings' management was never successful in realizing a sale in respect of either the North Vancouver lands or the Esquimault property. No sale of these assets was realized before the Receivership of Shieldings created in September, 1994.

38 The objective of Shieldings' management to sell and realize a profit on the Versatile acquisition failed. The shipbuilding corporation ultimately filed under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 in March, 1991 and emerged in a new company known as Yarrows Limited ("Yarrows"). The Versatile acquisition loan of $32 million from BNS resulted in substantial ongoing interest obligations and carrying costs for Shieldings.

39 The Versatile investment in June, 1989, was the last major new acquisition by Shieldings. Thereafter, management focused upon seeking to realize upon the existing assets in its portfolio. However, asset sales were difficult given the economic recession of the early 1990s. As Shieldings needed more money, a $22 million equity infusion was made in December, 1990 with BNS contributing $8.5 million of this amount. With the death of Mr. Willis, the driving force of Shieldings, in December, 1991, the problems of Shieldings were compounded.

40 Mr. Gil Bennett became CEO and Mr. Michael Trites became Vice-President Finance. A 30 month business plan was presented to the board of directors at its meeting February 27, 1992. In the meanwhile, further funds were required to protect and maintain Shieldings' operations. By the end of 1993 a further $14.3 million in equity was contributed by the shareholders.

Brenda Bay Timber Company Limited ("Brenda Bay")

41 Brenda Bay was owned 50% by a subsidiary of Shieldings, being Shieldings Forest Products Inc. ("SFPI"), and 50% by a subsidiary (Eacom Timber Sales Ltd.) of Doman Industries Inc. ("Doman"), subject to a unanimous shareholders agreement dated May 12, 1988, with a buy-sell 'shotgun' provision. The main asset of Brenda Bay was a 13,000 hectares tree farm with a secondary asset being development lands, called the "Lake Cowichan lands."

42 In 1993 Shieldings wanted to sell off the tree farm of Brenda Bay. Shieldings' management hoped that the net proceeds from a sale of the tree farm would be more than $15 million and would be utilized to pay off the then existing revolving credit line ("RTC") extended by BNS and leave a residual of some $2.5 million as operating capital. The Lake Cowichan lands would remain as an asset, directly or indirectly owned by Shieldings.

43 Shieldings' board of directors met August 3, 1993. Shieldings' management hoped that its partner, Doman, in Brenda Bay would elect to buy if Shieldings triggered the buy-sell shotgun through an offer to sell to Doman.

44 The board determined at its meeting August 3, 1993 to trigger the buy-sell clause with a strike price of $56 million for Brenda Bay. While the expectation had been that Doman would elect to purchase Shieldings' interest, Shieldings had a 'backstop agreement' whereby John Hancock Mutual Life Insurance Co. ("John Hancock") would purchase the

entirety of the tree farm of Brenda Bay from Shieldings in the event that Shieldings was required to purchase the interest of Doman.

45 Mr. Tanner had prepared a memo which mentioned that bridge financing might be required in the event that Doman elected to sell its interest in Brenda Bay rather than purchase Shieldings' interest. Bridge financing would be necessary for a four day period between a purchase by Shieldings of Doman's 50% interest and the closing of the follow-on purchase by John Hancock (through the back-stop agreement) from Shieldings of what would then be its 100% interest in the tree farm of Brenda Bay.

46 Shieldings exercised its rights under the buy-sell provision by putting Doman to its election. Shieldings hoped and anticipated Doman would elect to buy Shieldings' 50% interest in Brenda Bay held through SFPI. However, Doman elected to sell its 50% interest in Brenda Bay. Accordingly, utilization of the bridge financing by BNS was necessary.

The Bridge Financing Extended by BNS

47 In January, 1991, Shieldings' debt to BNS in respect of an unsecured operating line of credit ("UOC") was about $16 million. Unsecured debt of BNS would, of course, rank *pari passu* with other unsecured creditors in the event of the bankruptcy of Shieldings.

48 In December, 1990 the Shieldings' shareholders had subscribed for their *pro rata* shares of a $22 million rights offering. The proceeds were used to pay down the UOC's outstanding balance of some $16 million. The UOC was reduced to zero at that time. As well, some of the proceeds, together with the sale proceeds of Air Nova, another Shieldings' investment, were used to pay interest arrears and some principal on the Versatile loan.

49 Shieldings executed on March 13, 1991, a "Secured Revolving Term Credit Agreement" ("RTC") dated January 31, 1991. The plaintiffs submit the RTC agreement was not properly authorized by Shieldings, the purported security was ineffective, and that unsecured advances were made on the RTC to September 1993 and the time of the Brenda Bay transaction.

50 The evidence does not support the plaintiffs' position in respect of the RTC. The RTC and security agreement were signed by Messrs. Willis and Godsall on behalf of Shieldings. The directors of Shieldings were well aware of the RTC and the advances made to Shieldings thereunder.

51 A request by a customer-borrower for any credit facility from the BNS, depending upon the borrower, the amount and the terms, could proceed through as many as four levels of scrutiny by the Bank after a recommendation by the branch dealing with the customer. The approval process could extend through Corporate Banking East to Corporate Credit East, to the Senior Credit Committee and perhaps to the Loan Policy Committee. Mr. Belcher was a member of the Loan Policy Committee from 1991 through September, 1994.

52 Messrs. Tanner and Trites had first met with the BNS branch handling the Shieldings' account on July 29, 2003 to consider the bridge financing which might be necessary in respect of the intended and anticipated disposition of Brenda Bay should Doman elect to sell upon the buy-sell provision being triggered.

53 BNS was informed August 11, 1993 of this request for approval of bridge financing in the event it should become necessary. Messrs. Tanner and Trites understood from the branch contacts that the Bank was favourable and inferred that the only security contemplated was in respect of the asset (the tree farm) being sold with the security expiring upon repayment to the Bank of the bridge loan. BNS ultimately provided the bridge financing, but subject to certain significant conditions, discussed below.

54 At that time the Shieldings' revolving line of credit, or RTC, with BNS was at its limit with $15,700,000.00 owing and payment past due. Messrs. Tanner and Trites requested that the expiry of this credit facility be extended by BNS to September 30, 1993.

55 On August 11, 1993, Corporate Banking East advised Corporate Credit East that the bridge loan was approved should it become necessary, provided the sale proceeds from the John Hancock transaction, after repayment of the bridge loan, would be used to effect a "permanent reduction in Facility #1" [i.e. the revolving line of credit or RTC, with the amount then outstanding of about $15,700,000.00]. Corporate Credit East determined that this credit line would be reduced to only $3 million in on-going availability to Shieldings.

56 If there were still net proceeds from the Brenda Bay sale after this reduction to Facility #1 then such balance would be used to pay down Facility #3, being the $32 million loan in respect of the 1989 Versatile transaction. As of August 6, 1993 there was still some $29,941,000.00 outstanding in respect of this borrowing. (Facility #2 was a non-revolving loan of some $1,950.00 involving an investee company of Shieldings, Yukon Pacific Forest Productions Limited. This loan remained unsecured at the Shieldings level). Mr. Bennett later outlined these conditions in a September 15, 1993 memo to Shieldings' directors.

57 However, it is to be noted that the net proceeds available to Shieldings in the event that Doman elected to sell (as Doman did) would be only about $15.1 million (as the Royal Bank was a secured creditor as a direct lender to Brenda Bay for a substantial amount in respect of the Brenda Bay tree farm).

58 Shieldings learned August 27, 1993 that Doman had elected to be a seller of its Brenda Bay interest. The closing for the transaction was projected for September 10, 1993. BNS was advised August 30, 1993 of the necessity of finalizing the bridge loan. To that point, there was no term sheet or draft documentation exchanged between Shieldings and BNS in respect of the bridge loan.

59 Messrs. Trites and Tanner met with BNS branch officials September 7, 1993. The closing in respect of the Brenda Bay transaction was three days off. Shieldings provided a new cash flow forecast and, for the first time, proposed that not all of the proceeds be paid to reduce bank debt. Specifically, the Bank was asked to not apply proceeds to reduce the 1989 Versatile loan.

60 Put simply, BNS chose not to agree to this request. BNS was entirely free to make this decision and it was understandable, given the history of events to date and the repeated failed promises of Shieldings' management. The existing RTC facility was at its limit and past due. The continuing undertaking by Shieldings at the time of the Versatile acquisition in June, 1989 was that the proceeds of any asset sales in excess of $250,000.00 would be used to reduce the $32 million loan in support of the Versatile acquisition. As well, the contemplated structuring of the Brenda Bay transaction suggested that for tax reasons there might be a shift of assets with a wind-up of the Shieldings' subsidiary, SFPI, with its indirectly held Lake Cowichan lands moving up to Shieldings. Thus, there was an additional reason for the Bank to want to track the assets and obtain real security in respect of those assets from Shieldings itself to avoid any possible prejudice.

61 A letter agreement was signed September 9, 1993 between the Bank and Mr. Godsall on behalf of Shieldings as to the terms of the bridge loan. The directors of Shieldings have never disputed this letter agreement. Mr. Bennett approved and signed the minutes of the August 3, 1993 board authorization in respect of the Brenda Bay transaction which included the recognition of the need for bridge financing, after reading the memo of Mr. Trites of September 9, 1993 as to the final position of BNS in respect of the terms of the requested bridge loan.

62 The evidence establishes that Messrs. Trites and Tanner had the authority to cause Shieldings to enter into the September 9, 1993 letter agreement and to grant three $85 million demand debentures in favour of BNS as security. One was in respect of Brenda Bay's assets, a second was in respect of SFPI's assets, and a third provided for "first ranking fixed (non-specific) and floating charges over all of the present and future undertaking, property and assets" of the borrower, Shieldings. (At this point, the total existing outstanding debt of Shieldings to BNS was about $50 million and the bridge loan would add a further approximate $35 million.)

63 The evidence establishes the board of directors authorized the arrangements contemplated by the September 9, letter agreement. Legal counsel to Shieldings provided an opinion that Shieldings had the ability to proceed and that the September 9, 1993 letter agreement and the $85 million demand debentures were valid and binding.

64 Mr. Bennett reported to the directors in writing September 15, 1993 following upon the completion of the Brenda Bay transaction and did not raise any concern in respect of the bridge loan and attendant conditions and security given by Shieldings.

65 Mr. Bennett, an experienced corporate lawyer, was not called as a witness by the plaintiffs. Nor was Mr. Godsall. Nor were any of the directors.

66 The September 9, 1993 letter agreement references two separate loan facilities and the security required. One was the bridge facility of about $35,500,000.00. The other is the second amended RTC facility which was to expire very shortly. BNS agreed to provide $3 million through a new RTC facility.

67 The Bank imposed conditions that all of the proceeds from the sale of the Brenda Bay tree farm to John Hancock would be applied to repay the $35,500,000.00 bridge loan, pay down the outstanding balance on the RTC (the authorized amount of the RTC being permanently reduced to $3,000,000.00) and third, to reduce the balance owing on the then outstanding $29,941,000.00 loan extended to #366 in connection with the Versatile transaction and guaranteed by Shieldings.

68 BNS advanced some $35.5 million to Shieldings September 10, 1993 to enable the purchase of Doman's 50% interest in the tree farm to be completed. The RTC was continued to September 30, 1993 with a limit of $3 million. The $85 million demand debentures *inter alia*, were given to BNS, by Shieldings and its subsidiaries, as security.

69 On September 14, 1993 the tree farm was sold to John Hancock. The amount paid by John Hancock to Shieldings for the tree farm, US$40,500,000.00, was paid to BNS by the direction of Shieldings. This money was sufficient to repay BNS the $35.5 million bridge loan, to pay down the RTC from $15.7 million and to pay down the outstanding Versatile loan by $2,619,901.17.

70 The $85 million demand debentures given by Shieldings as security continued to apply to those residual lands beneficially owned by Shieldings as a result of the purchase from Doman, being in the main the Lake Cowichan lands which were estimated to have a value of some $5 million (and as well to some "environmental carve out" from the tree farm property which was not purchased by John Hancock).

71 Levy seeks to delete or set aside the security that the Bank required as a condition of advancing funds to Shieldings. Levy claims to either rank ahead of BNS's claim or, at least, *pari passu.* Also, Levy attacks the payment of interest on the amended RTC for the funds advanced.

The Oppression Remedy

72 Trade creditors and contingent judgment creditors are not complainants of right under s. 245 of the *OBCA*. A court has the discretion to provide standing as a complainant: s. 245 (c). The defendants did not oppose Levy's assertion that it had standing as a complainant; however, the defendants vigorously oppose the plaintiffs' submission that there was oppression.

73 Assuming the plaintiffs are proper complainants, the oppression remedy is available to protect the plaintiffs' "reasonable expectations": *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 191.

74 In considering the oppression section of the *OBCA*, and other comparable statutes, the issue as to whether there has been oppression is fact specific: see *Ferguson v. Imax Systems Corp.* (1983), 43 O.R. (2d) 128 (Ont. C.A.), at 137, leave to appeal refused, (1983), 2 O.A.C. 158 (note) (S.C.C.); *Ford Motor Co. of Canada v. Ontario (Municipal Employees*

Retirement Board) (2004), 41 B.L.R. (3d) 74, 2004 CarswellOnt 208 (Ont. S.C.J. [Commercial List]) at para. 215; and *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1998), 110 O.A.C. 160 (Ont. Div. Ct.), at 163.

75 Recognizing that some parameters are necessary, courts have developed general principles in approaching claims for an oppression remedy.

76 The starting point is for the complainant to establish the complainant's reasonable expectations in the relationship between the complainant, the corporation and the other stakeholders. See *Buttarazzi Estate v. Bertolo* (2004), 40 B.L.R. (3d) 287, 2004 CarswellOnt 17 (Ont. S.C.J.) at para. 12; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.), at 177, leave to appeal refused (2002), 163 O.A.C. 397 (note) (S.C.C.); *Renegade Capital Corp. v. Schmalz* (2003), 36 B.L.R. (3d) 294 (Ont. S.C.J. [Commercial List]), at 300.

77 Although a finding of bad faith or want of probity is not required for a finding of oppression, its presence may indicate oppression. See *Ford Motor Co. of Canada*, *supra* at para. 224.

78 The Court will be reluctant to interfere with business decisions that have been made in good faith and on reasonable grounds. The affairs of a corporation are to be managed under the direction of its board of directors. Directors and officers must be given considerable latitude in exercising their business judgment in the handling of a corporation's affairs.

79 The courts recognize and respect the autonomy of the corporation and the expertise of its management. Directors and officers must act in the best interests of the corporation. Absent bad faith, or some other improper motive, business judgment exercised in the perceived best interests of the corporation that, with the benefit of hindsight, has proven to be mistaken, misguided or imperfect, will not give rise to liability through the oppression remedy. See *Ford Motor Co. of Canada*, *supra* at para. 215; *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Ont. Gen. Div. [Commercial List]), at 777 cited with approval in *Renegade Capital Corp*, *supra* at 301.

Was There Oppression by BNS?

80 The objectively determined reasonable expectations of a person in the position of the complainant are to be considered in addressing the issue as to whether there has been oppression. Insofar as a contingent creditor in the position of Levy is concerned, the exercise is to identify what those reasonable expectations were, or could be as a matter of law, and whether Shieldings complied with them.

81 Shieldings funded its operations by a combination of debt and equity. The loans made by BNS were made at arms length on market terms to Shieldings while it was solvent. The security given to BNS was granted when Shieldings was solvent. The evidentiary record establishes that Shieldings used the proceeds from these loans for its own business purposes, including the preserving of its investments.

82 In my view, the security interests given in respect of such loans are valid and enforceable. My reasons follow.

83 Accusations have been made as to Mr. Belcher's conduct as a director of Shieldings, claiming that he somehow dominated its other directors. The complaint is that, in effect, BNS controlled *de facto* Shieldings. There is no evidence to support such accusations. Indeed, the record establishes the contrary.

84 I find Mr. Belcher to be credible and accept his evidence. In my view, he acted honestly and properly as a director of Shieldings at all times and with a view to acting in the best interests of that corporation.

85 Mr. Belcher had prepared for his testimony through a review of the extensive documents available. He had the most detailed involvement of any of the witnesses. He readily acknowledged his participation in various events and acknowledged events in which he was not involved. He had sworn a lengthy affidavit in 1995 after reviewing the files and undergone some 11 days of discovery over 1997 to 2001. His evidence was informed and straightforward.

86 This is not a case of asset stripping through non-market value transactions. Mr. Willis had an extraordinary relationship with the senior management of BNS such that Shieldings was afforded favourable treatment from the Bank.

87 Mr. Tanner was the person who arranged the John Hancock back-up for the Brenda Bay transaction. Mr. Tanner and Mr. Trites dealt with the Bank in arranging the bridge financing. Neither Mr. Tanner nor Mr. Trites had any contact with Mr. Belcher in the August-September 15, 2003 time period when the negotiations with the Bank took place.

88 There is no impediment in law or principle to a shareholder advancing loans to the corporation in which the shares are held and receiving security therefore. It is not uncommon that this is done. Public policy in a free market economy supports this flexibility in the movement and formation of capital.

89 The evidentiary record does not raise any issue in respect of Shieldings having failed to comply with its corporate constitutional documents in terms of the loans and security given. Nor is there any evidence that the price of any loan varied from what the market would require.

90 The UOC was outstanding from about June 1987 to February 1991 when it was repaid. The plaintiffs do not assert that it was improper for Shieldings to enter into the loan nor do they complain as to its terms. Rather, the plaintiffs say that it was oppressive to pay interest after July 1988 and to repay the loan notwithstanding Shieldings would be in breach of contract if Shieldings did not pay.

91 Levy does not criticize the June 1989 loan to purchase Versatile or the terms of that loan. Levy attacks the repayment of principal of $2.6 million made in September, 1993 (from the proceeds of the Brenda Bay sale). Levy also claims to rank ahead of BNS, or at worst *pari passu* for any payment that may ultimately be realized through the receivership with respect to the sale of the Versatile assets.

92 The RTC, with security, was agreed to in February 1991 and repaid in full in September 1993. It was replaced at that time by an amended RTC in the amount of $3 million which was fully drawn by fresh advances as at the date of the receivership. The RTC has now been repaid in full by the proceeds of asset dispositions.

93 Levy argues that BNS should rank behind Levy's claim, or at best *pari passu*, in respect of the RTC and amended RTC. Levy asserts it was oppressive to enter into, grant security for, pay interest and to repay the RTC and amended RTC.

94 In my view, the approach to dealing with all of the plaintiffs' claims is as follows.

Is a given loan valid and enforceable?

95 First, is a given loan and any security granted valid and enforceable as between BNS and Shieldings?

96 The power to borrow is *intra vires* a modern corporation: *OBCA* s.19. A lender is entitled to rely upon the indoor management rule when dealing with a corporation seeking to borrow funds: *OBCA* s.19. That is, the lender is entitled to assume that the affairs of the corporation have been conducted in accordance with its internal constitution. In any event, the record establishes that Shieldings complied with its internal constitution in respect of its borrowings from BNS.

97 The ability of a corporation to raise funds through secured debt is a collateral aspect of the power to borrow. The right of a debtor to grant security is inherent to the debtor's right to carry on business and to deal with its property in the ordinary course of that business. See Kevin Patrick McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths, 1999) at para. 6.18.

98 Provided that the security given is not a fraudulent preference and complies with the registration requirements of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 or other applicable registration statutes, the registered security given gains priority over all unsecured creditors and all subsequent secured creditors.

99 The fact of fresh credit being extended to a debtor in return for security will generally mean that the transaction cannot be considered to be a fraudulent preference. See *Aboud, Re* (1940), 22 C.B.R. 121 (Ont. S.C.), at 127.

100 A solvent corporation is free to carry on its affairs as it sees fit, subject to its contractual obligations with respect to those debts. A debtor can choose to pay one creditor over another unless it is insolvent or has in its contemplation an event of bankruptcy. See *Hudson v. Benallack* (1975), [1976] 2 S.C.R. 168 (S.C.C.), at 175-76.

101 The power to borrow and to provide guarantees and undertakings clearly implies the power to make payments in accordance with the terms on which a loan has been provided.

102 Moreover, equitable doctrine provides that if a corporation borrows money and uses the borrowing to pay its debts or uses the monies otherwise in the normal course of its business, the loan is repayable, and applicable security is enforceable, even though the lender may know of the want of power of the corporation to borrow. See *Guaranteed Hardware Co., Re*, [1972] 3 O.R. 138 (Ont. S.C.), at 141; *Bank of Montreal v. Petrobuild Ltd.* (1981), 94 A.P.R. 375 (N.B. Q.B.), at 381-82.

103 A corporation can cure a defect in authority in entering any contract by ratifying the contract, assuming that the contract is otherwise *intra vires* the corporation. A court will determine whether substantive ratification has occurred by the circumstances. If a corporation learns of an unauthorized contract but does not give back any benefits received pursuant to that contract the corporation will be taken to have ratified the contract. See *Great Northern Grain Terminals Ltd. v. Axley Agricultural Installations Ltd.* (1990), 76 Alta. L.R. (2d) 156 (Alta. C.A.), at 159. As stated above, in my view the evidentiary record establishes that Shieldings complied with its internal constitution in respect of its borrowings from BNS. However, if there was any defect in authority in any instance of borrowing the evidentiary record establishes that there was substantive ratification by Shieldings in respect of its obligations under such contract(s) to borrow monies from BNS.

104 As has been stated above, the evidentiary record establishes that the corporation was solvent until June 23, 1994 with the passage of the *Comcor Act*.

105 On December 13, 1990 the Loan Policy Committee of BNS had approved the new RTC facility with security by a first charge on all of Shieldings' assets. The evidence establishes that Mr. Willis bargained aggressively in respect of the rate of interest to be charged, meeting with very senior bank officers. The rate was reduced from the initial proposal of prime plus two percent to prime plus one-half percent.

106 Messrs. Willis and Godsall had executed the RTC Agreement by March 13, 1991. The evidence establishes the likelihood that this was done with prior board approval. Mr. Godsall on September 23, 1991 confirmed the approval by a certified resolution of the board of directors. It was known at the February 15, 1991 board meeting that Shieldings needed to borrow the money to be made available by the RTC. At that point, as stated above, BNS was asking for interest at the rate of prime plus two percent. The Shieldings board of directors often held meetings by telephone. The evidence indicates approval of the RTC was given after Mr. Willis successfully negotiated the reduced rate of interest. Counsel to Shieldings had provided an opinion that Shieldings was authorized to enter into the RTC agreement.

107 If Messrs. Willis and Godsall had not been authorized to execute the RTC, then Mr. Godsall could have so testified. He reportedly had agreed to cooperate with the plaintiffs in exchange for being released from the judgment against him in the Tecmotiv action. The plaintiffs did not call him as a witness. Indeed, the plaintiffs did not call any of the directors to testify.

108 In my view, and I so find, the RTC was validly entered into and the advances made thereunder were validly secured.

109 In the fall of 1992 Shieldings was in breach of the covenants of the RTC Agreement. Shieldings sought an extension of the term of the RTC from December 31, 1992 to February 28, 1993. Shieldings also sought an increase in the RTC limit from $8.5 million to $15.7 million.

110 An RTC Extension Agreement was executed by Mr. Tanner on behalf of Shieldings September 22, 1992, incorporating by reference the terms of the RTC.

111 The plaintiffs do not dispute that all amounts drawn on the RTC were used by Shieldings for corporate purposes, including for costs associated with Brenda Bay and with the Comcor project.

112 The financial statements of Shieldings for each fiscal year of the RTC existence were approved by Shieldings' board of directors. The statements disclose the existence of the RTC, the security given, and the fact of Shieldings being generally in default of its covenants.

113 There is no evidence that either Mr. Belcher or BNS had any belief that the RTC loan was not properly authorized. Indeed, all of the evidence suggests that everyone involved with Shieldings believed that the RTC was valid and that the security given in connection therewith was enforceable.

114 Levy submits that the payment of the net proceeds from the sale of Brenda Bay to BNS to pay down the RTC and the Versatile loan was a "preference."

115 There is no support in the evidence for this contention. All the evidence is to the contrary.

116 BNS had good, enforceable security in respect of the RTC loan which Shieldings' management agreed would be repaid from the proceeds of the Brenda Bay sale. BNS had security over the Brenda Bay assets. Since June 1989 Shieldings had contractually promised BNS that any proceeds of sale of assets in excess of $250,000.00 would be used to reduce the Versatile loan. The memoranda internal to Shieldings relating to Brenda Bay from 1989 to the sale in September, 1993 indicate that Shieldings intended to use the net proceeds to reduce bank debt. For example, the 30 month plan presented to Shieldings' directors in February, 1992 indicated that Shieldings expected to sell its interest in Brenda Bay by August, 1992 with the anticipated net proceeds to be used to reduce bank debt. For example, a cash flow forecast prepared for the board of directors by Mr. Bennett in March, 1993 indicated that the entire net proceeds from the sale of Brenda Bay would be used to reduce bank debt.

117 A rights offering had been agreed upon by the board in March, 1993. $7.2 million was raised in April 1993 by a share issuance for the purpose of reducing bank debt. BNS subscribed for its *pro rata* share, thus in effect converting $2,890,000.00 of its secured debt to equity (and thereby subordinating its position to this extent to any unsecured creditors of Shieldings) some six months before the closing of the Brenda Bay transaction. This fact alone belies any assertion that the Bank's economic interest was being preferred.

118 The First RTC Extension Agreement had expired February 28, 1993. By a Second RTC Extension Agreement dated June 4, 1993, executed by Messrs. Tanner and Trites, BNS agreed to extend the RTC to June 30, 1993. Again, Shieldings agreed on June 9, 1993, through Messrs. Trites and Tanner, that the net proceeds from the Brenda Bay sale would be used to retire the RTC and reduce bank debt. Mr. Trites wrote to BNS June 21, 1993 requesting a further extension of the RTC term to September 30, 1993, which was authorized June 29, 1993, it being again indicated that all proceeds of realization would be used to reduce bank debt.

119 At the August 3, 1993 board meeting to consider triggering the shotgun provision in respect of Brenda Bay, it was known that the proceeds of the contemplated Brenda Bay transaction would go to reduce bank debt, that the RTC was to expire September 30, 1993, that the Bank had made no promise for future bank lines of credit and that BNS preferred Shieldings to finance itself forward by equity. Finally, it was known that the Bank would expect additional security in respect of any future funding.

120 The plaintiffs submit that the proceeds of the Brenda Bay transaction should not have been applied in respect of the loan to #366 to fund the Versatile transaction. The plaintiffs say that in August, 2003, the Bank knew that the Tecmotiv trial had concluded and there was already a pending decision then under reserve for more than three months.

121 However, in granting the bridge loan, BNS had made it a condition that the entirety of the Brenda Bay proceeds was to go to retire bank debt. The Versatile loan had been intended as only a four month loan back in June, 1989. The loan was secured in part against the North Vancouver lands owned by #366. As well, Shieldings had given an undertaking at the time that any disposition of assets in excess of $250,000.00 would be applied to reduce debt to BNS.

122 All Bank debt had to be retired, of course, before there could be any return on the shareholders' investments in Shieldings. It was a business decision by Shieldings' management to take the bridge financing on the terms offered. None of Shieldings' directors, each of whom was sophisticated and represented major shareholders, objected to the Brenda Bay bridge loan arrangements involving BNS and the granting of the $85 million demand debentures as security.

123 When the Comcor debentures, (held by the institutional investors of Shieldings) secured only by a pledge of Comcor shares by Shieldings, ultimately turned out to be worthless in June, 1994 those debentures were left as unsecured obligations of Shieldings through the Shieldings' guarantee. If the plaintiffs' arguments as to the invalidity of the $85 million debentures had any force then it would mean that the Comcor debentures should properly rank *pari passu* with the RTC and Versatile loans at the Shieldings level. Yet no director or institutional shareholder of Shieldings has challenged or called into question the Bank's position on its $85 million demand debentures as security. This suggests that all the directors knew that the Shielding's board accepted and approved the use of the Brenda Bay proceeds and the grant of security on the terms seen, that is, with the $85 million demand debentures.

124 The resolution of the board of directors certified by Mr. Tanner as corporate secretary September 10, 1993 authorizing completion of the Brenda Bay transaction included, *inter alia*, the undertaking "to give such security as the Bank may require".

125 Shieldings was not insolvent in September, 1993. It was not until April, 1994 that the Levy judgment in the Tecmotiv action was given that there was a significant creditor apart from BNS. It was not until the Comcor project collapsed in late June, 1994 that Shieldings was rendered insolvent.

126 When Shieldings was made a defendant in the Tecmotiv lawsuit the corporation was faced with two considerations in respect of its financial statements, given that the lawsuit represented a possible contingent liability. See *Canadian Institute of Chartered Accountants Handbook*, looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981), at s. 3290.

127 First, a decision as to whether disclosure is required had to be made. Second, if there is to be disclosure, a decision was required as to whether the corporation should take an accrual or reserve with respect to the contingent liability.

128 Disclosure is meant to alert all users of the financial statements to the potential liability of the corporation but does not necessarily result in an adjustment to the balance sheet or income statement.

129 In my view, Shieldings treated the Tecmotiv lawsuit, commenced in July, 1988, appropriately. It disclosed its existence in notes on the financial statements commencing with the February 29, 1988 financial statements. Management made an assessment at that time and in each fiscal year thereafter that the lawsuit had no merit and was without significant risk to Shieldings. This assessment was made each year after the auditor received a written opinion from Shiledings' legal counsel. The auditor followed applicable Generally Accepted Accounting Principles ("GAAP") and Generally Accepted Auditing Standards ("GAAS").

130 Management reasonably anticipated that Shieldings would be successful in its defence of the Tecmotiv action. The objective proof of the state of mind of the board of directors is seen in the contribution by all the institutional

investors of substantial equity *after* the commencement of the Tecmotiv action which claimed some $25 million plus punitive damages against Shieldings.

131 A corporation is obliged to assess a claim made against it using reasonable judgment and to act accordingly with respect to the financial and operational implications.

132 Where, as in the case of Shieldings, a corporation believes with the assistance of its legal counsel that it has substantive defences to the lawsuit such that it is unlikely the contingent liability will become an actual liability, the proper treatment is disclosure in the notes to the financial statements but to not include the contingent liability as a reserve or as an accrued liability.

133 This approach of GAAP and GAAS provides a fair picture of the business to persons dealing with it. To require that an unlikely contingent liability be treated in the financial statements as an actual liability could have serious practical ramifications. It could unfairly and severely hinder the business in its business operations, in the raising of money, and in its dealings with creditors.

134 It follows then that there is no reason to be critical of a corporation when the reasonable judgments made turn out in hindsight to be incorrect. It would be unfair to retroactively adjust the priority of the claims of third parties who advanced funds or changed their positions on the basis of those judgments as reflected in the financial statements.

135 Actions on debts are not generally the subject of oppression applications. See *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]), at 92. Rather, the common law governing creditor-debtor relationships, together with statutory law such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, and the *Personal Property Security Act* will apply.

136 There is no real factual evidence in the case at hand as to the plaintiffs' reasonable expectations in respect of its interests being protected by Shieldings. The reasonable expectations for someone in the position of the plaintiffs measured by an objective standard would be twofold: first, that Shieldings would conduct itself in accordance with GAAP and GAAS with respect to the assessment and treatment of the contingent judgment claim on Shieldings' financial statements; and second, that the management of Shieldings would not engage in 'asset stripping' or a reduction in the capitalization of the corporation to the disadvantage of creditors.

137 The term 'asset stripping' covers transactions (in the face of a contingent claim against the corporation) for which the corporation does not receive fair value and which are commonly structured with non-arms length parties to the directors/shareholders. The stripping of the assets results in the corporation being unable to pay its debts. See for example *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp.* (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.), at 196-97, aff'd (2003), 40 B.L.R. (3d) 88 (Ont. C.A.).

138 It is not oppression for the shareholders to put in new equity or where a lender, like BNS, has made new funds available on the basis of a grant of security through commercially reasonable loans granted on market terms.

139 The plaintiffs do not attack *shareholder transactions* in the case at hand. BNS has not received any monies as a shareholder. Rather, it has lost its entire equity investment, being some $26 million. Nor has any other shareholder received any return of equity.

140 The plaintiffs allege that Mr. Belcher abused his position as the nominee director of Shieldings on behalf of the so-called dominant shareholder, BNS, to its advantage. The plaintiffs seek to have the BNS loans subordinated to their unsecured claim against Shieldings or, at least, to gain a *pari passu* position with the Bank.

141 The other five corporate shareholders are independent, major corporations with sophisticated financial and legal advisors. It is extremely unlikely that the nominee directors of any of them would be puppets of BNS. There is no

evidence to suggest they were. None of these other shareholders or their nominee directors for Shieldings testified. There is no evidence that any have ever raised accusations against BNS or Mr. Belcher.

142 Mr. Belcher was only one of six (later seven) directors. He did not have the numerical ability to impose his will. BNS did not have a majority voting interest in Shieldings and could not override the other shareholders. The evidence establishes that the Bank did not always prevail in its preferred position with respect to management and shareholder decisions. It is apparent that there was very little conflict at the board level of Shieldings. Votes were generally unanimous.

143 Neither Messrs. Trites nor Tanner gave any evidence to assist the plaintiffs in their contention as to Mr. Belcher abusing his position. Mr. Tanner had no reason to be surprised that the Bank required Shieldings to provide the $85 million demand debentures in respect of the Brenda Bay bridge loan. Mr. Tanner knew that there was verbal approval only of the bridge loan by the line officers of the Bank at the branch level. Shieldings was requesting the bridge loan from the Bank on very short notice. The loan terms and security documentation remained to be determined with finality by the Bank's internal hierarchical credit approval process.

144 The management of Shieldings did not question or complain about the Bank's requirement for additional security through the $85 million demand debentures. As well, given all the circumstances, Messrs. Tanner and Trites were unrealistic in their expressed desire that the Bank would not require a pay down of the RTC and other debts with the Brenda Bay proceeds. The plaintiffs did not call as witnesses any directors nor did they call either of Messrs. Bennett and Godsall, the two main officers of Shieldings.

145 The plaintiffs claim that Mr. Belcher was in breach of his duties as a director of Shieldings. They allege he acted with other senior bank officials in imposing the debentures as security in the Brenda Bay transaction such as to constitute "a preference of the BNS as creditor."

146 The Bank had two interests in Shieldings: as a shareholder and a distinct, separate interest as a lender. There is no inherent conflict between Mr. Belcher's duty as a director of Shieldings and the Bank's interest as a *shareholder*.

147 There was a potential for conflict between the Bank's interest as *lender* and hence, Mr. Belcher's duties as an employee of the Bank and Mr. Belcher's duties as a director of Shieldings. This was recognized from the beginning of Shieldings' dealings with the Bank. This potential for conflict was dealt with by disclosure and by Mr. Belcher not making decisions with respect to lending by BNS to Shieldings. Rather, the evidentiary record shows he assisted Shieldings in his role as a director on occasion by ensuring the Bank's lending side understood the nature and importance of requests of Shieldings for credit.

148 It is to be noted incidentally that Mr. Belcher was generally of the view that Shieldings should be funded by equity infusions by the shareholders rather than by borrowings from BNS. That is, he personally was not in favour of new borrowing by Shieldings after 1989.

149 In particular, Mr. Belcher was not involved in the two transactions that are the primary subject of the plaintiffs' allegations, being the negotiations in 1990 and 1991 leading to the RTC and the September 9, 1993 letter agreement relating to the Brenda Bay transaction. Mr. Belcher was not present at the Loan Policy Committee meetings with respect to either the 1991 RTC loan or the 1993 Brenda Bay transaction. Mr. Belcher also testified he had no involvement in the UOC negotiations in 1987.

150 Mr. Belcher did not manage the Bank's loan portfolio. He stated that he had no communication with Messrs. Tanner or Trites in the time period in August-September, 1993, relating to proceeding with the Brenda Bay transaction. Messrs. Trites and Tanner did not testify as to any contact with Mr. Belcher over the relevant time frame. Mr. Belcher says he was not aware as to how the Bank intended to take security in respect of the bridge financing. There is no documentary or viva voce evidence to suggest that the lending side of the Bank had any contact with Mr. Belcher as to the terms and conditions of the Brenda Bay loan. The internal Bank documents, read fairly, tend to confirm that Mr. Belcher had nothing to do with the Bank's terms and conditions with respect to the Brenda Bay bridge financing.

151 There is no evidence that Shieldings had alternative sources of credit available at better rates or on more favourable terms than those extended by BNS, or that Shieldings would not have had to provide like security to another lender. In my view, and I so find, considered by an objective standard, the conduct of the Bank as lender at all times, and specifically, in August-September, 1993, was commercially reasonable and fair to Shieldings. Indeed, Shieldings itself, arms-length to the Bank, has never complained about the Bank's conduct.

152 The evidence establishes that Mr. Belcher at all times understood full well his duties as a director of Shieldings. I find that at all times he acted reasonably, conscientiously and properly as a director of Shieldings. He never purported to act as Shieldings itself. Shieldings acted through its management. Mr. Belcher had no personal interest in conflict with the interests of Shieldings nor did he have any actual conflict of interest as a nominee director of BNS. I find Mr. Belcher acted honestly and in good faith with a view to the best interests of Shieldings. He exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. He met his common law and ss. 132 and 134 *OBCA* obligations and duties as a director.

153 In my view, and I so find, the plaintiffs' allegations are not substantiated. Indeed, the evidence is all to the contrary. Mr. Belcher and BNS acted properly and reasonably throughout in their dealings with Shieldings.

154 The crux of the plaintiffs' alleged oppression is that the challenged loans, security and repayments constituted a preference in favour of the Bank. The plaintiffs claim in their submissions, if not in their pleading, that the Bank caused Shieldings to prefer the existing debts of the Bank as creditor, by securing them against the contingent unsecured judgment of the plaintiffs.

155 However, "until a debtor is insolvent or has an act of bankruptcy in contemplation" the debtor is "free to deal with his property as he wills and he may prefer one creditor over another": *Hudson v. Benallack*, *supra* at 175 per Dickson J. See also *Van der Liek, Re* (1970), 14 C.B.R. (N.S.) 229 (Ont. S.C.), at 232.

156 Put otherwise, the plaintiffs must establish first, that Shieldings was insolvent at the date of the impugned transaction and second, that at that date the transaction constituted a preference, that is, all creditors were not treated equally. The plaintiffs' claim fails on several bases.

157 First, there was no evidence led to establish that Shieldings was insolvent in August-September, 1993 or at any time prior to passage of the legislation June 23, 1994, that effectively ended the Comcor project. Indeed, the evidence indicates, applying the accepted tests for insolvency, that Shieldings was solvent until late June, 1994.

158 Second, the evidence indicates the Bank was the only significant creditor of Shieldings until the failure of the Comcor project. The only other persons visibly claiming to be creditors are the plaintiffs. But the plaintiffs were contingent creditors with an unliquidated claim for damages until April 1994 when they successfully gained a judgment in the Tecmotiv action and the right of appeal was later exhausted.

159 The common law definition of "debt" is a specified sum of money owing by one person to another which includes not only the obligation of the debtor to pay but also the right of the creditor to receive and to enforce payment by legal process. See *Central Capital Corp., Re* (1995), 29 C.B.R. (3d) 33 (Ont. Gen. Div. [Commercial List]), at 44, aff'd (1996), 27 O.R. (3d) 494 (Ont. C.A.), at 531; *207053 Alberta Ltd., Re* (1998), 7 C.B.R. (4th) 32 (Alta. Q.B.), at 35.

160 However, a contingent creditor might arguably claim oppression because of a preference in a situation when there is not yet insolvency and where the creditor's claim at the time of the impugned transaction is for an unliquidated sum. See *Downtown Eatery*, *supra*; *Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd.* (2001), 20 B.L.R. (3d) 156 (Ont. S.C.J.), at 163-64.

161 Such a situation is most readily seen where two elements are present: first, when it seems probable that the contingent creditor is going to successfully gain a judgment such that the contingent liability is recognized by GAAP

and GAAS as requiring an accrual or reserve relating to the contingency; and second, it is established that the impugned action of the debtor in dealing with another creditor is *intended* to confer a preference and defeat the contingent judgment creditor in the later event of an insolvency. One would expect to see indicia of collusion in such a situation such as a non arms-length relationship involving the impugned transaction.

162 That is not the situation here. The evidence establishes the Bank and Shieldings were acting at arms-length at all times. The evidence establishes the Bank was not seeking a preferred position vis-à-vis the plaintiffs, nor was Shieldings seeking to give the Bank a preferred position. The insolvency and bankruptcy of Shieldings were not in the contemplation of either the Bank or Shieldings until the Comcor project collapsed in June, 1994. The financial statements provided full disclosure of the Tecmotiv action. Accounting principles and auditing standards did not require a reserve to be taken, given that it was reasonable to regard the contingent liability as improbable because of Shieldings' asserted defence.

163 The oppressive conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. See *Downtown Eatery*, *supra*. However, it must be established that a complainant has a reasonable expectation that a corporation's affairs will be conducted with a view to protecting his interests.

164 Until the judgment of Lane J. in the Tecmotiv action, the status of Levy was merely that of a contingent claimant, or potential judgment creditor, asserting an unliquidated demand against Shieldings, a potential judgment debtor who might have exigible assets.

165 Levy had a reasonable expectation that the affairs of Levy's potential debtor, Shieldings, would be conducted honestly and in good faith, based on the reasonable business judgment of its directing mind, and in a manner that did not *unfairly* prejudice or affect Levy's interests. Levy did not have a reasonable expectation that Shieldings would be managed and operated in such a way as to ensure Levy was paid the debt of Shieldings if and when there was a judgment favourable to Levy following upon the trial in the Tecmotiv action. See the judgment of Blair J.A. in *Stabile v. Milani Estate*, [2004] O.J. No. 2804 (Ont. C.A.) at para. 46.

166 Not all conduct that has a harmful effect to a complainant gives rise to recovery under the oppression remedy of s. 248 (2) of the *OBCA*. Not only must the reasonable expectations of the complainant Levy be defeated by the impugned conduct, but the conduct involved must be such as to effect a result that is "oppressive," or that "unfairly prejudices" the complainant, or that "unfairly disregards the interests of the complainant." See *Stabile v. Milani Estate*, *supra* at paras. 35 and 47 per Blair J.A.

167 The evidentiary record establishes that the affairs of Shieldings relevant to the issues in the case at hand (and in particular, the affairs of Shieldings in its dealings with the Bank) were conducted honestly and in good faith, based on the reasonable business judgment of Shieldings' directing mind, and in a manner that did not unfairly prejudice or unfairly affect Levy's interests.

168 As I also find, the Bank acted honestly and in good faith, and with reasonable business judgment, as a creditor/ lender to Shieldings. As well, I find that Mr. Belcher acted honestly and in good faith and in the best interests of Shieldings at all times in his capacity as a director of Shieldings.

169 The Bank was an arms-length creditor of Shieldings. The Bank did not control Shieldings. The Bank was independent of Shieldings. The Bank determined the terms of its loans to Shieldings and the security required. Levy did not have any reasonable expectation that the Bank would, or should, compromise its loan terms in September, 1993 on the basis that a contingent judgment creditor might obtain judgment and thereby become a competing creditor of Shieldings. When new funds are advanced by a creditor the creditor can demand new and greater security. The new security can reach back and add security to funds that were loaned at an earlier time.

170 Levy arguably has a reasonable expectation that Shielding's affairs will be conducted by the management of Shieldings with a view to fairness in protecting the interests of Shieldings' creditors, including the interest of a contingent judgment creditor. But Shieldings' borrowings from BNS, and in particular, the bridge loan in September, 1993, were

clearly seen by Shieldings' management and based upon the directors' judgment to be in the best interests of Shieldings and hence, in the best interests of any unsecured *contingent* judgment creditor of Shieldings.

171 Shieldings (and its shareholders) needed, and wished, to sell its assets. The Brenda Bay transaction was a favourable sale at a fair price. Shieldings could only complete the sale with the bridge loan in place. The Bank had the right and power to state the terms on which it would make the bridge loan.

172 The Bank did not control Shieldings or act unfairly in its arms-length relationship to Shieldings. Shieldings was free to accept or reject the terms offered. Shieldings accepted the terms of the bridge loan.

173 There is no evidence to suggest Shieldings would have received more favourable terms from another lender. The evidence suggests the contrary. In any event, if Shieldings could have somehow obtained better terms from another lender so as to not disadvantage a contingent creditor, any oppressive conduct was simply the conduct of Shieldings and not BNS. (Levy has, of course, an existing judgment against Shieldings in its Tecmotiv action. It would be of no practical purpose to seek a new judgment against Shieldings for oppressive conduct in failing to satisfy that existing judgment.)

174 There is no basis for the plaintiffs to assert a successful claim of equitable subordination, a doctrine seen in American case law. The Bank did not engage in inequitable conduct. The actions of the Bank did not confer any unfair advantage on the Bank. See *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, 7 B.L.R. (2d) 113 (S.C.C.), at 151-52 per Iacobucci J.

175 The directors and officers Bennett and Godsall undoubtedly had knowledge of the relevant facts and material evidence to offer. As already stated, the plaintiffs reportedly had the cooperation of Messrs. Bennett and Godsall in advising the plaintiffs as to their knowledge of the relevant facts. Levy entered into a settlement with Mr. Godsall and some of the Shieldings directors in respect of the action at hand. This oppression action, which at its inception included them as defendants, was dismissed with the individual defendants agreeing to make themselves available for interviews with Levy's counsel, attend examinations under oath and as witnesses at trial if requested, and produce for review all relevant, non-privileged documents within their power, possession or control.

176 It seems certain that if there was any such evidence which would have supported the position the plaintiffs advance that one or more of the directors and officers would have been called as witnesses by the plaintiffs. No explanation is offered by the plaintiffs for not calling any of these potential witnesses. The only reasonable inference is the adverse inference that the evidence of these material witnesses would be contrary to the plaintiffs' case. See generally John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 297, s. 6.321. Plaintiffs' counsel impress as very conscientious in having exhausted every conceivable evidentiary path. I have no doubt they have thoroughly reviewed all possibly relevant documents. I have no doubt they have interviewed every potential witness.

Disposition

177 For the reasons given, the action is dismissed. I may be spoken to as to costs.

178 The Court recognizes and appreciates the co-operative approach of all counsel in presenting the voluminous documentary evidence through a well-organized, electronic medium via computer screens. This approach saved considerable time and money for all concerned. All issues in this complex action were thoroughly and exhaustively canvassed by counsel for all parties.

Action dismissed.

1999 CarswellOnt 1456
Ontario Superior Court of Justice

Carom v. Bre-X Minerals Ltd.

1999 CarswellOnt 1456, [1999] O.J. No. 1662, 35 C.P.C. (4th) 43, 44 O.R. (3d) 173, 46 B.L.R. (2d) 247, 98 O.T.C. 1

Donald Carom, 3218520 Canada Inc. 662492 Ontario Limited, Osamu Shimizu and Eugene Schonberger, Plaintiffs and Bre-X Minerals Ltd., Bresea Resources Ltd., John B. Felderhof, David G. Walsh, Jeanette Walsh, T. Stephen McAnulty, Nancy Jane McAnulty, John B. Thorpe, Rolando C. Francisco, Hugh C. Lyons, Paul M. Kavanagh, Nesbitt Burns Inc., Egizio Bianchini, First Marathon Securities Limited and Kerry Smith, Defendants

Donald Carom and 662492 Ontario Limited, Plaintiffs and SNC-Lavalin Group Inc., SNC-Lavalin Inc., Kilborn Engineering Pacific Ltd., Kilborn SNC-Lavalin Inc. and P.T. Kilborn Paka Rekayasa, Defendants

Kanta Menta, Plaintiff and TD Securities Inc. and Ken Gillis, Defendants

Adenat Corp., Plaintiff and Scotia McLeod Inc. and Ted Reeve, Defendants

Ronald Parent, Plaintiff and Midland Walwyn Capital Inc. and Michael Jalonen

Fred Hines, Plaintiff and Levesque Beaubien Geoffrion Inc. Michael Fowler, Defendants

Celtic Mortgage Corp., Marisue Gardonio and Larry Freeman,
Plaintiffs and CIBC Wood Gundy Securities Inc., and Bruno Kaiser

Winkler J.

Heard: March 8-11, 29-31, April 1, 9 and 12-13, 1999
Judgment: May 13, 1999
Docket: 97-GD-39574, 97-GD-41854, 97-GD-42031, 97-GD-42033, 97-GD-42036, 97-GD-42034, 97-GD-42037

Counsel: *Harvey Strosberg, Q.C.*, *D.H. Jack*, *Heather Rumble Peterson* and *Paul J. Pape, Q.C.*, for Plaintiffs, Donald Carom, 3218520 Canada Inc., 662492 Ontario Limited, Osamu Shimizu, Eugene Schonberger, Kanta Menta, Adenat Corp., Ronald Parent, Fred Hines, Celtic Mortgage Corp., Marisue Gardonio and Larry Freeman.
Larry Thacker, for Estate of David Walsh, Stephen McAnulty, Jeannette Walsh and Nancy McAnulty.
Douglas Stewart, Q.C., for Bresea Resources Ltd.
Robert J. Potts and *Rob Muir*, for John B. Thorpe.
B. Bellmore, for Rolando Franscisco.
P. Levay, for Paul M. Kavanagh.
Joseph Groia, for John B. Felderhof.
John A. Campion, *William Hourigan* and *Ward Branch*, for Nesbitt Burns Inc. and Egizio Bianchini.
Joel Wiesenfeld, *Jane Ratchford* and *Laura Paglia*, for First Marathon Securities Limited and Kerry Smith.
Thomas G. Heintzman, *J. Thomas Curry* and *J.V. O'Donnell Q.C.*, for Defendants, SNC-Lavalin Group Inc., SNC-Lavalin Inc., Kilborn Engineering Pacific Ltd., Kilborn SNC-Lavalin Inc. and P.T. Kilborn Paka Rekayasa.
Benjamin Zarnett and *Jessica Kimmel*, for Defendants, TD Securities Inc., Ken Gillis, Midland Walwyn Capital Inc., Michael Jalonen, Levesque Beaubien Geoffrion Inc. and Michael Fowler.
Robert L. Armstrong and *Dana B. Fuller*, for Defendants, Scotia McLeod Inc. and Ted Reeve.
Michael Birley and *J. Maron*, for Defendants, CIBC Wood Gundy Securities Inc. and Bruno Kaiser.

***Winkler J.*:**

Introduction

1 This is a motion by the plaintiffs seeking certification of seven intended class proceedings brought under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. ("*CPA*"), known collectively as the "Bre-X actions".

2 Bre-X Minerals Ltd. (Bre-X) is an Alberta company which was involved in exploring, acquiring and developing gold mining properties in the Busang area of East Kalamantan province in Indonesia. As a result of a series of announcements dealing with the level of gold resources in the Busang, the price of Bre-X stock rose from approximately 50 cents a share in May 1993 to $228 dollars a share in May of 1996, when the stock split ten for one. The share prices plummeted when independent sources indicated that the gold resources claimed in the announcements were unsubstantiated, culminating on May 7, 1997 with the Toronto Stock Exchange delisting Bre-X. Independent testing later revealed that the gold samples from Busang had been "salted."

3 These intended Bre-X class proceedings are commenced by various representative plaintiffs who are shareholders or former shareholders of Bre-X on behalf of proposed classes of persons who purchased Bre-X shares and suffered a net loss as a consequence.

4 Of the seven Bre-X actions, the main action ("The Bre-X-Carom I action") is brought against Bre-X, its officers and directors and other parties allegedly related to the company and against Nesbitt Burns Inc. and First Marathon Securities Ltd., two securities houses alleged to have promoted the sales of Bre-X shares, as well as stock analysts employed by the two brokerage firms. The defendants in the second action ("The SNC-Lavalin-Carom II action") are SNC-Lavalin Group Inc. and various allegedly related companies. These engineering companies are said to have conducted the independent analysis of the gold resources in the Busang for Bre-X. The five remaining actions ("The Brokers actions") are brought against brokerage firms, and the analysts employed by them, who are alleged to have promoted Bre-X stock. An eighth action ("The Spartacus action") named Ingrid Felderhof and Spartacus Corp. as defendants and has been stayed by order of this court.

5 The statements of claim assert causes of action framed in negligence, negligent and fraudulent misrepresentation, conspiracy, breach of contract, breach of fiduciary duty and breach of the *Competition Act*, R.S.C. 1985, c. C-34, although each one is not alleged as against every defendant.

6 In order to be certified as a class action, the criteria contained in s. 5(1) of the *CPA* must be met:

> 5.(1) the court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
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> (a) the pleadings or the notice of application discloses a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
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> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

7 It was determined *ex proprio motu* in this court's case management capacity that the certification motions ought to move forward in stages. In accordance with this directive various pleadings motions were heard and determined at an earlier stage in these proceedings. Moreover, there was a common understanding amongst all parties that the disposition with respect to the pleadings motions would also determine the first requirement for certification pursuant to s. 5(1)(a) of the *CPA*, that the pleadings discloses a cause of action. In light of those reasons and subsequent amendments to the statements of claim the plaintiffs have met this requirement of s. 5(1)(a) in all of the intended class proceedings.

8 The reasons released on February 11, 1999 dealt with the second criterion for certification in s. 5(1)(b) of the *CPA* that there be an identifiable class of two or more persons. The plaintiffs proposed class definitions in each of the actions which provided for a class which would include plaintiffs who were not resident in Ontario on an opt out basis. In those reasons, the proposed "national class" was adopted by this court for the purpose of class definition. However, certain details remain to be to be determined with respect to the actual class descriptions.

9 The instant motion deals with the aspects of the certification motion under s. 5 of the *CPA* that remain to be disposed of, namely common issues, preferable procedure and representative plaintiffs in each of the actions, as well as the remaining issues relating to the class descriptions.

10 In essence the claim against Bre-X and the insiders is the alleged fraud to run up the price of the Bre-X stock. I am satisfied that there are common issues arising out of the causes of action in conspiracy and fraudulent misrepresentation, as well as the *Competition Act*. A class proceeding is the preferable procedure for the resolution of these issues.

11 The focus of the claim against SNC is the use by Bre-X in it's public relation disseminations to the world at large of statements attributable to SNC. It is alleged that SNC acquiesced in this use of it's work product by Bre-X. I have found that there are no common issues which emerge from the causes of action asserted in negligent misrepresentation and negligence, and that even if there had been, a class proceeding would not be the preferable procedure for determining any such issues.

12 The causes of action in negligent and fraudulent misrepresentation and under the *Competition Act* which are advanced against the brokerage firms, and their analysts personally, are based squarely on the numerous analysts reports produced by them. In my view there are common issues arising out of each cause of action asserted. Nonetheless a class proceeding is not the preferable proceeding for the resolution of these common issues because of the significant individual issues of reliance, causation and damages that will remain to be resolved at lengthy, complex individual trials

13 My reasons follow.

Part I - The Bre-X-Carom I Action

14 In the Bre-X-Carom I action, for the purposes of the remaining certification issues, the defendants Bre-X, Bresea, and the named defendants who are directors, officers or employees of the companies (collectively "the Bre-X defendants"), are dealt with separately from the defendants Nesbitt Burns and First Marathon and their respective analysts. The latter defendants are dealt with together the brokerage firms and analysts in Part III of these reasons, (The Brokers actions).

Class Definition

15 The plaintiffs submit that the appropriate class description in the action against the Bre-X defendants is "all those persons in Canada who purchased shares of Bre-X from May 1, 1993 to March 26, 1997 and suffered a net loss as a result". "Persons" as defined by the plaintiffs includes all individuals, corporations and institutions that purchased Bre-X shares, subject to the following exclusions: the defendants in any of the actions, members of the immediate family of

any of the defendants in any of the actions, any subsidiary or affiliate of any defendant in any of the actions, any entity of which any excluded person has a controlling interest and the legal representatives, heirs, successors and assigns of any excluded person and any person who worked in the research department of a broker defendant and worked on an analysis of Bre-X at any time.

16 The motion for certification in this action is brought by five proposed representative plaintiffs, namely Donald Carom, 3218520 Canada Inc., 662492 Ontario Limited, Eugene Schonberger and Osamu Shimizu. The plaintiffs concede, however, that if the court accepts the class description as those persons trading in Bre-X shares who suffered a "net loss", the plaintiff Donald Carom does not meet that criteria and thus is not an appropriate representative plaintiff.

17 In my view, the class definition is over-inclusive. As stated in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10:

> The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

18 Central to the allegations in this action is the element of fraud. The plaintiffs concede that this fraud was publicly disclosed on March 26, 1997. The stock prices plummeted as of that date culminating in the losses sought to be recovered in this class proceeding. The plaintiffs state that anyone purchasing shares after March 26 should be excluded from the class because anyone purchasing shares after that date did so when they knew or ought to have known of the fraud. However, those who purchased and sold the shares prior to the disclosure of the fraud, regardless of whether or not they suffered a loss, must also be excluded from the class. Their losses do not arise from the causes of action pleaded and, thus, they cannot be included in the class. Accordingly, the class description is amended to include, "all those persons in Canada who held shares in Bre-X as of March 26, 1997 and suffered a net loss as a consequence." The plaintiffs exclusions are acceptable. Donald Carom is removed as a representative plaintiff. The remaining plaintiffs are described as follows in the statement of claim.

The Plaintiffs

19 3218520 Canada Inc. ("321 Canada") has its corporate head office at Montreal, Quebec. The company investment decisions were made by its president, Greg Windsor. 321 Canada purchased 500 shares of Bre-X on September 23, 1996, at a cost of $13,975. The shares were never sold and are now worthless.

20 662492 Ontario Limited ("662 Ontario") is an Ontario company. Ivo Battistella is its president and was responsible for the investment decisions of 662 Ontario. Between May 14, 1996 and April 23, 1997, 662 Ontario traded in Bre-X shares and lost approximately $762,000.

21 Eugene Schonberger is a resident of Ontario who purchased 10,500 shares of Bre-X for an aggregate cost $201,825 between April 23, 1996 and February 26, 1997. He sold 4,000 shares for aggregate proceeds of $92,800. He continues to hold 6,500 shares which are now worthless.

22 Osamu Shimizu is a resident of Ontario who purchased 300 shares of Bre-X in September of 1996 for an approximate total price of $7,887. He continues to hold the shares which are now worthless.

The Claims

23 The plaintiffs assert claims against the Bre-X defendants framed in conspiracy, fraudulent misrepresentation, negligent misrepresentation and breach of the *Competition Act*.

The Defendants

24 In addition to Bre-X and Bresea, which are described below, the Bre-X defendants include certain named individual defendants. The statement of claim describes these individuals and makes certain allegations against them as follows.

25 David Walsh, prior to his death, was the Chairman of the Board, President, and Chief Executive Officer of both Bre-X and Bresea. He held Bre-X and Bresea shares and sold portions of his holdings in 1995 and 1996, allegedly realizing approximately $25,000,000 on these sales. This action is continued against his estate.

26 Jeannette Walsh was Walsh's spouse. She was the Corporate Secretary of Bre-X and Bresea and an employee of both at all material times. She is alleged to have held shares in both companies and sold portions of her holdings in Bre-X during 1995 and 1996, realizing approximately $30,000,000 on these sales. It is further alleged that she realized approximately $1,300,000 on the sale of Bresea shares.

27 John Felderhof is a geologist currently residing on Grand Cayman Island. He was Vice-Chairman and Senior Vice President of Bre-X, responsible for supervising, exploring and developing its Indonesian properties until he was dismissed in May 1997. He was a director of Bre-X between 1995 and May 1997. It is alleged that he held Bre-X and Bresea shares which he sold between 1994 and 1997, realizing approximately $71,000,000.

28 T. Stephen McAnulty resides in Calgary, Alberta and during all material times, was a Vice-President and director of Bre-X. For part of this period, he was its Director of Public Relations. It is alleged that he had primary responsibility, along with Walsh, for the preparation and distribution of the Bre-X press releases. The statement of claim alleges that he held shares in Bre-X and Bresea and further, that he sold some of his holdings in both companies realizing approximately $8,200,000 on the Bre-X sales and approximately $5,600,000 on the Bresea sales.

29 Nancy McAnulty is the wife of MacAnulty. It is alleged that she acted as his agent in the sale of Bre-X stock from which she realized approximately $11,500,000.

30 John Thorpe was the Treasurer of Bre-X and Bresea and a director of Bresea. He allegedly held shares in Bre-X and Bresea. He sold some of his shares in both realizing approximately $4,100,000 on the Bre-X sales and approximately $6,400,000 on the Bresea sales.

31 Rolando Francisco was the Executive Vice-President, Chief Financial Officer and a director of Bre-X from April 1996, until he resigned in May 1997. He was the chief negotiator for Bre-X with certain third parties seeking to acquire an interest in the Bre-X properties. He held shares in Bre-X and options on shares in Bresea. It is alleged that he sold some of his holdings in Bre-X realizing approximately $1,200,000.

32 Hugh Lyons was appointed a director of Bre-X in 1996. He held this position in addition to being a director of Bresea until he resigned from both on May 7, 1997. He held shares in Bre-X and Bresea. He is alleged to have sold some of his holdings in both realizing approximately $1,250,000 on the Bre-X sales and approximately $2,000,000 on the Bresea sales.

33 Paul Kavanagh was appointed a director of Bre-X in 1994 and held that position until he resigned on May 7, 1997. Although not an employee of Bre-X, he advised Felderhof and Bre-X's board of directors in respect of the technical aspects of Bre-X's exploration activities in Indonesia. He held shares in Bre-X. It is alleged that he sold some of his holdings realizing approximately $500,000.

Facts

34 The plaintiffs allege the following facts in a 148 page fresh statement of claim.

35 Bre-X Minerals Ltd. was incorporated in Alberta in 1988 as a junior mining resource company engaged in the exploration, acquisition and development of gold mining properties. In July of 1989, the shares of Bre-X were listed for trading on the Alberta Stock Exchange. A related company and co-defendant, Bresea Resources Ltd. was incorporated

in Alberta in 1980, and continued as a federal corporation in 1990. Bre-X and Bresea owned shares of each other at all times material to the actions.

36 In 1987, an Australian based joint venture obtained a contract of work (COW) to drill for gold in an area of Indonesia known as the Busang. The results of the project were varied but generally poor. The project was put on hold indefinitely in 1989. The Australian company which was lead partner in the joint venture changed ownership in 1991 and the new owner retained the defendant John Felderhof to assist in disposing of the joint venture's interests in Indonesia, including the Busang COW.

37 By 1992, Felderhof had disposed of all of the Indonesian properties with the exception of the Busang. He retained Michael De Guzman, now deceased, to prepare a feasibility study of the Busang property. The study was based on 4 days of field work and the previous results from the property.

38 In 1993, Walsh expressed to Felderhof Bre-X's interest in acquiring properties in Indonesia and was advised of the Busang property. Walsh met with Felderhof in Indonesia and agreed to pay US$80,000 for an option to acquire an 80% interest in the Busang COW which option could be exercised for a $100 payment. At that time, Bre-X also employed Felderhof for a $10,000 per month management fee.

39 On May 6, 1993, Bre-X signed an agreement-in-principle to purchase the Busang option and contemporaneously issued a press release highlighting the De Guzman study. The press release stated that the study showed gold in sufficient quantities to yield an annual after-tax cash flow of US$10 million for the company.

40 Bre-X and Bresea purported to utilize exemptions available under the securities laws in Alberta to sell stock in Bre-X to the public to raise money for both the purchase of the Busang option and exploration of the property. The companies raised $1.3 million from the public through the sale of shares in 1993 and during the first 5 months of 1994. While this money was being raised, Bre-X issued a series of press releases building on the favourable results stated in the May 6, 1993 press release. The price of Bre-X shares on the ASE increased correspondingly.

41 Bre-X purported to acquire 90% interests in two additional properties in the Busang in March 1994 and June 1995 respectively. Throughout 1994 and 1995 Bre-X continued to issue positive press releases indicating progressively increasing estimates of the gold reserves on the properties it controlled. In August 1995, Bre-X retained Kilborn Engineering to produce a pre-feasibility study of the gold resources in the Busang. Kilborn was acquired by the SNC-Lavalin Group in May, 1996. Beginning in October of 1995; Bre-X, in its press releases, explicitly stated or implied that Kilborn, and later SNC-Kilborn, had independently audited and verified its drilling results. By the end of 1995, Bre-X stock on the ASE was trading at $53.00 per share as compared to $0.50 per share in 1993.

42 In 1996, numerous favourable press releases were issued by Bre-X. On April 23, 1996, Bre-X shares began trading on the Toronto Stock Exchange. The opening price on the TSE was approximately $192 per share. On August 19, 1996 the shares began trading through the NASDAQ system in the U.S. and on September 3, 1996, the shares were listed for trading on the Montreal Stock Exchange.

43 During the summer of 1996, Bre-X's preliminary survey permit for Busang expired. It was renewed for a one year period and then cancelled because of unresolved disputes regarding Bre-X's ownership of development rights in respect of the Busang properties. These facts were not publicly disclosed until October of 1996.

44 To resolve the dispute with the Indonesian government, Bre-X was required to seek a partner to help develop the Busang properties. In the fall of 1996 it entered into negotiations with Barrick Gold Corp. Barrick commenced a due diligence review of the potential of the properties and on December 15, 1996 advised Bre-x that the tests conducted as part of the due diligence revealed that there was no discernible gold in 148 of 150 samples taken. Despite this, Barrick issued a press release on December 16, 1996 stating that it and Bre-X had jointly submitted a proposal to the Indonesian government for the development of the Busang properties.

45 Though the negotiations between Bre-X and Barrick were progressing, they had not been finalized and on January 22, 1997, Bre-X was advised by the Indonesian Minister of Mines and Energy that it had a 30-day deadline within which to complete the negotiations for the development of the Busang properties. In response Bre-X announced on February 17, 1997 that it had formed a joint venture with certain Indonesian partners, the Indonesian government and Freeport-McMoran Copper and Gold, Inc. to develop the properties.

46 On or about March 1, 1997, Freeport-McMoran commenced its own drilling on the Busang properties in order to verify the drilling results reported by Bre-X. On March 10, Freeport-McMoran advised Walsh it had failed to find any gold.

47 On March 19, 1997 Bre-X retained Strathcona Mineral Services Limited to perform a technical audit of Bre-X's exploration work. On the same day, Bre-X announced that the geologist De Guzman had fallen to his death from a helicopter on his way to the Busang to meet with representatives of Freeport-McMoran.

48 Three significant events occurred on March 26, 1997: Strathcona informed Bre-X of the possibility that the Bre-X drilling samples had been tampered with; Freeport-McMoran issued a press release stating that it had failed to find any significant amounts of gold in areas where Bre-X had previously drilled and reportedly found gold; and SNC-Kilborn issued a press release stating that it had not conducted any independent drilling and assaying on the Busang properties, but rather had relied upon information provided by Bre-X.

49 On May 3, 1997 Strathcona issued an interim report outlining the results of its technical audit of the exploration work conducted by Bre-X. In addition to the findings of deficiencies in the processes conducted by Bre-X, there was a finding that the samples taken by Bre-X had been salted with gold from a location other than the Busang. A cover letter to Walsh advised that there was no evidence of an economic gold deposit in the southeast zone of the Busang property and that it was unlikely that there was such a deposit.

50 On May 7, 1997, Bre-X shares were delisted by the Toronto Stock Exchange.

The Theory of the Plaintiffs

51 The essence of the plaintiffs' claim in the Bre-X-Carom I action is that the Bre-X defendants conspired to increase the price of Bre-X shares for their own benefit. Based on the very first press release issued by Bre-X on May 6, 1993, the plaintiffs allege that Bre-X, Bresea, Walsh and Felderhof, from the beginning were primarily concerned with promoting, and thereby inflating, the price of the shares of Bre-X and Bresea, "by selling a story of gold in the Indonesian jungle, without regard for the truth or veracity of the story itself."

52 The plaintiffs allege that the named individual defendants, in furtherance of this conspiracy, participated in the drafting, preparation and approval of the various public statements, announcements, press releases, shareholder and investor reports and other communications disseminated by Bre-X and Bresea which contained material misrepresentations with respect to the nature of Bre-X's interest in the Busang properties and the amount of gold contained there.

53 The rise in the price of shares of Bre-X parallelled the increasing estimates of the gold resources in the Busang. The plaintiffs state that during the period beginning in May 1993 and culminating with the de-listing of Bre-X, the defendants disseminated some 160 press releases and other statements in furtherance of their conspiracy to inflate the price of Bre-X shares and thereby benefit from their sale.

54 On May 6, 1993, Bre-X issued a press release which estimated that the gold in the Busang was mineable in sufficient quantities so that the "company's net annual after tax cash flow would be US$10 million". Thereafter, the company periodically issued press releases which contained increasing estimates of gold reserves. On December 30, 1996, the Northern Miner newspaper reported that Bre-X's updated resource calculation in all categories stood at 57.33 million

ounces, that Bre-X anticipated gold resources to exceed 60 million ounces and that production costs of US$96 per ounce would make the Busang one of the lowest cost gold mines in the world.

55 On May 10, 1993 Bre-X shares were trading at $0.50 each on the Alberta Stock Exchange. Three years later, in May 1996, one month after Bre-X shares were listed on the TSE, they were trading at $228 when they were split 10 for 1. In December, 1996, the shares were trading at $21.70 each, or calculated on a pre-split basis, $217.00.

56 The plaintiffs provide the following chart of sales, allegedly compiled from insider trading reports, to illustrate the benefit that each defendant derived from the stock manipulation.

Defendant	**Dates of Sales**	**Proceeds**
David Walsh	11/01/95-8/27/96	$ 25,018,512
Jeannette Walsh	07/24/95-10/22/96	30,605,010
Felderhof	12/29/94-09/10/96	71,211,417
McAnulty	11/09/95-09/18/96	8,234,460
Thorpe	06/15/95-08/22/96	4,109,973
Francisco	08/01/96	1,254,500
Kavanagh	03/15/96-12/20/96	511,500
TOTAL		**$140,945,372**

57 Although the essence of the claim is the cause of action framed in conspiracy, the plaintiffs also allege that the foregoing facts give rise to causes of action in fraudulent misrepresentation, negligent misrepresentation and breach of the Competition Act.

The Position of the Defendants on the Certification Motion

58 The various defendants take the following positions on the certification motion:

a) Felderhof does not oppose certification, provided that:

i) the proceedings are conducted in three stages, the first of which makes findings of fact, a second stage determination of liability and a third stage for dealing with the individual damages.

ii) the common issues are as set out by Felderhof; and

iii) a bar order issues from this court preventing any other defendant whose case is not certified from proceeding against Felderhof, except within the confines of the class proceedings.

b) Kavanagh does not oppose certification if it is granted in respect of all of the defendants against whom the plaintiffs seek a certification order.

c) Lyons and Francisco do not oppose certification subject to revisions of the common issues.

d) Thorpe does not oppose certification in respect of the claims of conspiracy and breach of the Competition Act subject to revisions of the common issues. However, he objects to certification on the claims of fraudulent misrepresentation and negligent misrepresentation. Further, he requests that if certification is granted, that the court stay all other present and future actions against Thorpe related to this class proceeding or arising from the affairs of Bre-X generally.

e) Bresea does not oppose certification but submits that a separate sub-class of plaintiffs should be created, comprised of only those persons who purchased Bre-X shares directly from Bresea.

> f) The defendants the Estate of David Walsh, Jeannette Walsh and Stephen and Nancy McAnulty oppose certification.

59 In addition, certain of the defendants ask for an order that the plaintiffs provide security for costs, or in the alternative, that the plaintiffs add a representative plaintiff, institutional or otherwise, capable of complying with any adverse costs disposition on these motions.

A) Common Issues

60 The third element of the test for certification is contained in s. 5(1)(c) and requires that the "claims or defences of the class members raise common issues". The *Act* defines "common issues" in s. 1 as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

61 In *Bywater* this court stated at para. 12:

> The presence of common issues is at the very center of a class proceeding. It is the advancement of the litigation through the resolution of the common issues in a single proceeding which serves the goals of the Act. It is clear from the language of s. 5(1)(c) that the Act contemplates that there be a connection between the common issues, the claims or defences and the class definition. In like fashion, the common issues must have a basis in the causes of action which are asserted.

62 For the purposes of a class proceeding, common issues are not synonymous with common causes of action. Multiple plaintiffs may assert similar claims against a common defendant or defendants without raising common issues. The necessary nexus for certification is that the claims asserted raise "common, though not necessarily identical" issues of fact or law. Hence, the claims, and the circumstances in which they are raised, must be analyzed to determine whether common issues are present.

63 A common issue must have sufficient significance in relation to the claim asserted such that its resolution will advance the litigation. Furthermore, the resolution of the common issue must advance the litigation in a meaningful way. As stated by Sharpe J. in *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 40 O.R. (3d) 776 (Ont. Gen. Div.) at para. 23:

> In determining what will move the litigation forward, it is important not to get lost in the details of a long list of issues, comprised of some, but not all, elements of the various causes of action that are pleaded. It is important to keep in mind the cause of action as a whole. How does the proposed common issue relate to the other issues that will have to be decided? Can it be said, in the context of the other issues and the cause of action as a whole, that the determination of the proposed common issue will actually decide and dispose of one aspect of the case that will move the litigation forward? Are there other significant issues that have not been identified as either a common issue or an individual issue that should be taken into account in assessing the issues that are identified?

64 However, as Sharpe J. further stated at para. 27:

> Even if there were a finding that ... [the defendant] misrepresented certain important facts, I do not accept that such a finding in the abstract would "move the litigation forward" in a meaningful way.

65 The sense of a common issue in the context of a class proceeding is, therefore, one which will not only move the litigation forward as a matter of logic, but is an issue in respect of which a finding will contribute to the case in a legally material way.

66 In respect of these defendants, the plaintiffs rely on the voluminous misrepresentations contained in the press releases and other statements originated by Bre-X and the individual defendants over the period of almost 4 years. These representations, they assert, constitute a single misrepresentation that "there is gold in mineable quantities" in the Busang. In consequence, they assert causes of action in conspiracy, fraudulent misrepresentation, negligent misrepresentation and breach of the *Competition Act*.

i) The Conspiracy Claim

67 The leading Canadian case dealing with the tort of conspiracy is the decision of the Supreme Court of Canada in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* (1983), 145 D.L.R. (3d) 385 (S.C.C.). Estey J., writing for the court, stated at 398-9:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> > 1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants conduct is to cause injury to the plaintiff; or
> >
> > 2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others) and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations however, there must be actual damage suffered by the plaintiff.

68 Here the plaintiffs allege that the rise in the price of the Bre-X shares over the 4 year period in question was a result of a conspiracy among the Bre-X defendants. The acts in furtherance of the conspiracy pointed to by the plaintiffs were the press releases and other statements in which the defendants knowingly misrepresented the nature and quality of the gold resource in the Busang. In the result, the plaintiffs state that these defendants caused damages to the plaintiffs who purchased the shares and suffered losses.

69 The plaintiffs state that common issues arise in respect of the claim of conspiracy. I have maintained the numbering assigned to these issues in the plaintiffs' litigation plan. The issues are as follows:

> 1. Did Busang contain gold in commercial quantifies or in quantities sufficient to make the mining of it commercially viable ("gold in mineable quantities")?
>
> 2. Was Bre-X operating a legitimate business?
>
> 3. Were the core samples from Bre-X salted with gold and, if so, how, when, where and by whom?
>
> 5. Did Bre-X follow generally accepted mining exploration practices and techniques and, if not, how did it deviate? Was any deviation reasonable under the circumstances?
>
> 6. Did Bre-X, Bresea and the Insiders or any of them conspire to inflate the price of Bre-X and Bresea shares on the Markets? If they did, what are the particulars of the conspiracy?
>
> 7. Did Bresea and the named individual defendants, or any of them, know or ought they to have known and, if so, who knew or ought to have known what, when and why and what should have they done, if anything.

70 In the context of the factual assertions advanced by the plaintiffs and the elements of the tort of conspiracy as stated in *Canada Cement LaFarge*, I am satisfied that the common issues as set out above constitute common issues for the purposes of the *Class Proceedings Act*.

ii) Fraudulent Misrepresentation and Negligent Misrepresentation.

71 The constituent elements of a claim for fraudulent misrepresentation were enunciated by the Supreme Court of Canada in *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at 344:

> ... Anson on Contract, 12th ed.; p. 187, where "fraud" has been defined, reads:
>
> > [Fraud is] a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.

See also *Peek v. Derry* (1889), 14 App. Cas. 337 (U.K. H.L.) at 374.

72 The tort of negligent misrepresentation has five constituent elements. There must be a duty of care arising from a special relationship between a representor and a representee. There must be a representation made that was untrue, inaccurate or misleading. The representor must have made the statement negligently. The representee must have reasonably relied upon the statement and further, suffered damage as a result of the reliance. See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at 110.

73 The essence of each tort is the representation made by the defendant to the plaintiff. The plaintiffs contend that the series of statements contained in the press releases and other documentation emanating from Bre-X, notwithstanding their number and diversity of content, contain a common misrepresentation, namely that "gold was present in mineable quantities in the Busang". Thus they contend that a number of common issues arise from what they state is a singular misrepresentation.

74 The plaintiffs identify some 160 statements made by the defendants over a 4 year period to a class indeterminate in number and national in scope. The statements were distributed to the public through various forms of media and subject to whatever editorial control that may have been exercised by the respective proprietors. The statements were received by investors with varying degrees of sophistication and knowledge, and more importantly, differing investment strategies. These differences among investors are reflected by the circumstances of the representative plaintiffs in the instant motion.

75 Shimizu claims to be an unsophisticated investor, who was persuaded to purchase shares of Bre-X by his investment advisor. After his purchase, Shimizu alleges that he was supplied with research reports which indicated, *inter alia*, that Bre-X was a well-managed, secure investment with one of the world's largest gold deposits. Shimizu was not an active trader of Bre-X shares, making only two purchases and no sales.

76 662 Ontario, through its principal, Battistella, maintained a "unique relationship" with its investment advisor. Battistella and the investment advisor spoke several times a day. Information was traded back and forth between Battistella and the investment advisor. Battistella was an active trader, sometimes holding positions in stock contrary to the recommendations in the research reports of the brokerage houses at which he traded.

77 Schonberger alleges that, though interested in the stock market, he is an unsophisticated investor. Nevertheless, he traded regularly in Bre-X stock, buying and selling the shares in some instances through a margin account, and at other times through an RRSP account.

The plaintiffs, notwithstanding their varying relationships with their investment advisors, state that the following common issues arise from their claims in negligent and fraudulent misrepresentation:

14. Did Bre-X and or the named individual defendants represent that:

a) There is gold in mineable quantities in the Busang?

b) Any company associated with SNC-Lavalin Inc. audited Bre-X's work or otherwise verified the accuracy of Bre-X's resource database?

c) Bre-X was operating a legitimate business?

15. Were the representations identified by issue 4 made knowing that they were false or recklessly, caring not whether they were true or false or without exercising reasonable care and attention?

16. Are the named individual defendants, or any of them, personally liable for any damages resulting from or caused by the representations identified by issue 4?

78 A reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is, of necessity, an individual inquiry. Thus, the plaintiffs contention that a multitude of statements can be reduced to a single core representation is antithetical to the essence of a common issue in a class proceeding. That is to say, that the common trial in the class proceeding is intended to resolve issues which have been determined to be common between the defendants and the plaintiff class. As such, a resolution binds every class member. The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which will be have to be made at individual trials, nor can it be based on an assumption to circumvent the necessity for the individual inquiries. As such, there is no prospect of a resolution in a trial on common issues which would advance this litigation in any manner as it relates to the claim in negligent misrepresentation.

79 However, I am of the view that the claim in fraudulent misrepresentation raises common issues. The plaintiffs' allegation is that the Bre-X operation was fraudulent. Therefore, it is contended, every representation, whenever made, is tainted by the fraud. The allegation that the fraud permeates every statement raises common issues regardless of whether individual issues may arise from the actual communications made to the class members.

iii) The Competition Act

80 The plaintiffs have pleaded that the defendants breached s. 52(1) of the Competition Act, giving rise to a civil cause of action pursuant to s. 36(1) of the Act. The sections provide:

52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) make a representation to the public in the form of a statement that is false or misleading in a material respect;

(b) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

36(1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, ...

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together

with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

81 The plaintiffs propose the following common issues in respect of this claim:

> 10. What is the meaning of the words "as a result of" in section 36 of the *Competition Act*?
>
> 11. Does the *Negligence Act* or the concept of contributory negligence apply in assessing loss or damage under section 36?
>
> 12. Must the plaintiffs prove an anti-competitive component to the *Competition Act* cause of action? If so, have they? Does Part VI apply to behaviour which is not anti-competitive?
>
> 13. Should the full costs of investigation in connection with this matter and the cost of the proceedings or part thereof be assessed globally as provided for in section 36 of the *Competition Act*, and if so, who should pay and in what amount(s)?
>
> 17. Was there a breach of Section 52 of the *Competition Act* by Bre-X and the named individual defendants giving rise to liability pursuant to section 36 if the Class Member can prove damages as a result of the representation(s)?

The plaintiffs contend that these are issues of law common to all members of the plaintiff class. I agree. They arise from the same factual background as the conspiracy and fraudulent misrepresentation claims.

82 The plaintiffs propose an additional common issue relating to damages. They assert that the conduct of the defendants gives rise to a common issue relating to damages which is common to the class members. They state the issue as:

> 9. Was the conduct of the defendants, or any of them, such that they ought to pay globally to the class members aggravated, exemplary or punitive damages?

83 I agree that the question of whether exemplary or punitive damages should be assessed in this action is a common issue. Aggravated damages however are compensatory in nature and hence, an individual issue. As stated by S.M. Waddams in *The Law of Damages*, 2nd Ed. (looseleaf)at pp. 11-1 & 11-2:

> The expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. "Exemplary" was preferred by the House of Lords in *Cassell & Co. Ltd v. Broome* but "punitive" has also been used in many Canadian courts including the Supreme Court of Canada in *H.L. Weiss Forwarding Ltd. v. Omnibus*. The expression "aggravated damages", though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.

84 Exemplary or punitive damages turn on the conduct of the defendants and not the entitlement of the plaintiff to compensation. They are intended to have a deterrent effect. Here the causes of action pleaded involve several intentional torts. In my view, this is an appropriate case to determine at a common issue trial whether exemplary or punitive damages should be assessed against the defendants. The issue will be restated as follows:

> 9. Was the conduct of the defendants, or any of them, such that they ought to pay globally to the class members exemplary or punitive damages?

B) Preferable Procedure

85 The fourth consideration for certification is whether a class proceeding would be the preferable procedure for the resolution of the common issues. In arriving at this determination, the court must also consider the individual issues as reflected in s. 6 of the *CPA*. Section 6 provides:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> > 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> >
> > 2. The relief claimed relates to separate contracts involving different class members.
> >
> > 3. Different remedies are sought for different class members.
> >
> > 4. The number of class members or the identity of each class member is not known.
> >
> > 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

86 Further, these considerations are to be weighed in the context of the three principal goals of the *CPA*, namely, judicial economy, access to justice and behavioural modification. As O'Brien J. stated in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at 461:

> I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation.
>
> In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing certification.

87 It was stated by this court in *Bywater* at para. 25-26:

> ... the central thrust of s. 6 is to ensure that the enumerated individual issues cannot be raised as absolute bars to certification. That is not to say, however, that individual issues are not to be taken into consideration in determining if a class proceeding is the preferable procedure. Indeed to so conclude would render any such exercise meaningless. Moreover, to apply a cumulative or quantitative approach to the individual issues referenced in s. 6 would have a like effect; for while they may exist, they may be relatively insignificant in the total context, or of inequal weight relative to each other or to the common issues. The court in reaching its decision on preferable procedure must of necessity consider all of the common and individual factors as part of the factual matrix.
>
> In determining whether the class proceeding is the preferable procedure, the court does not inquire as to whether the common issues predominate the individual issues. The predominance test has been rejected by Ontario courts. Instead the proper approach is to weigh all of the relevant factors, including the common issues and the individual issues in the context of the goals of the Act.

88 The plaintiffs conceded in oral argument that individual trials will be necessary for a final determination of the claims of each class member, in particular to determine issues of causation, reliance and damages arising from the claims. This is not fatal to certification. The *CPA* manifestly contemplates in ss. 11 and 25 that there may be a bifurcation of common and individual issues requiring individual trials in some circumstances.

89 The defendant Walsh submits that the trilogy of recent cases, *Rosedale*, *Controltech Engineering Inc. v. Ontario Hydro* (December 21, 1998), Doc. Toronto 97-CV-128910 (Ont. Gen. Div.) and *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.), dealing with negligent misrepresentation in the context of a class proceeding, stand for the proposition that a multiple misrepresentation case can never satisfy the elements of the *CPA*. I cannot accede this

to submission. Each case must turn on its own facts. But more importantly, this proposition comes perilously close to the American criterion requiring that the common issues predominate the individual issues, a notion squarely rejected by Ontario courts.

90 Moving from the general to the particular, I have found that there are common issues arising out of the claims in conspiracy, fraudulent misrepresentation and breach of the *Competition Act*. Subject to my remarks below concerning the litigation plan, I am of the view that a class proceeding is the preferable procedure for the resolution of the common issues with regard to the tort of conspiracy.

91 The plaintiff alleges a single conspiracy. The facts of this conspiracy would necessitate repetitious proof in each individual claim. The plaintiff, in order to be successful, must establish the fact of the conspiracy, its breadth and scope, the participants, the acts committed in furtherance of the conspiracy and whether it was directed at the plaintiffs or conducted in a manner that disregarded whether the plaintiffs would suffer harm. The proof required will be time consuming and costly to provide, even if done once in a common issue trial. This would be greatly exacerbated if necessary in each individual case. Hence in the present circumstances, the trial of the common issues arising from the claim in conspiracy will advance all three goals of the *CPA*, namely judicial economy, access to justice and behaviour modification of wrongdoers, notwithstanding that more than one of the individual issues set out in s. 6 of the *Act* may be present.

92 I note for clarity that only the claim framed in conspiracy has been pleaded against Bresea. Hence, the dispositions of the other causes of action alleged in this action do not apply to Bresea.

93 In the unique circumstances of this action, a class proceeding is the preferable procedure for dealing with the claim in fraudulent misrepresentation. I have found a class proceeding to be the preferable procedure for determining the common issues arising from the claim in conspiracy. Although the factual underpinnings may not be identical for the causes of action in conspiracy and fraudulent misrepresentation there is some inter-relation between them. Therefore, resolving the common issues arising out of these claims at a single common issue trial will advance the goals of the *CPA* and hence, a class proceeding is the preferable procedure for resolving the common issues arising out of the claim in fraudulent misrepresentation.

94 Similarly, for these same reasons a class proceeding is the preferable procedure for determining the common issues arising from the statutory civil cause of action for breach of the *Competition Act*.

95 I have concluded that there are no common issues concerning the claim in negligent misrepresentation but even if I had not so concluded, I would nevertheless find that a class proceeding is not the preferable procedure for the resolution of any such issues for the reasons particularized in the SNC-Carom II and Brokers actions.

96 Since I have found a class proceeding to be the preferable procedure for resolving the common issues in respect of the claim in conspiracy, I have concluded as well that it is in keeping with the goals of the *CPA* to determine the common issues arising out of the claims in fraudulent misrepresentation and breach of the *Competition Act* as part and parcel of the inquiry. The determination of the common issues proposed for the claims in fraudulent misrepresentation and under the *Competition Act* will not unduly complicate the common issue trial. In my view, it advances the goals of judicial economy to take advantage of the opportunity for efficiency presented by the common issue trial necessary for the claim in conspiracy. The fact that there will be a common issue trial between the same parties, on a claim which arises from the same background circumstances, favours including the common issues arising from claims in fraudulent misrepresentation and breach of the *Competition Act*. even though the plaintiffs may still have to engage in lengthy individual trials to determine the actual liability of the defendants on the claims. In these unique circumstances, the efficiencies achieved on the one hand, offset the inefficiencies on the other.

C) Representative Plaintiff

97 The final requirement for certification is that there be a representative plaintiff. Section 5(1)(e) states that the representative plaintiff must:

(i) ... fairly and adequately represent the interests of the class,

(ii) [produce] a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) ... not have an interest in conflict with the interests of other class members [on the common issues for the class]...

98 A practice has developed in class proceedings of accepting litigation plans in support of certification motions that are sparse and lacking in detail. While this may appropriate in more straightforward cases, in complex litigation such as the instant case, a detailed plan which meets the requirements of the *Act* is of critical importance.

99 The interrelation between the different elements of the certification test under s. 5(1) has been noted previously in these reasons. The requirements set out for the representative plaintiff accordingly do not stand in isolation. The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and, it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.

100 A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification. In this case, the national scope, the nature of the defendants, the uncertainty of the class size and the number of causes of action alleged mark this as litigation of the most complex nature and kind. Accordingly, a comprehensive and detailed litigation plan is required.

101 During the course of argument the plaintiffs were requested by the court to submit a revised plan. This plan as it pertains to the claims framed in conspiracy, fraudulent misrepresentation and the breach of the *Competition Act* does not meet the requirements of the statute. It does not, in its present form, set out a "workable" method of advancing the litigation. While it is not the role of the court to amend, or develop the litigation plan of the plaintiff, I note that there are conspicuous deficiencies. For example, the plan does not disclose a method for dealing with the claims of the extra-provincial plaintiffs. Furthermore, the plan contemplates that the individual proceedings, "mini-trials" is the term the plaintiffs use, will be conducted by a single judge. The sheer volume of contemplated proceedings, their inter-provincial nature and probable length militate against a single judge being able to accomplish the task in a reasonable time.

102 The plaintiffs shall have 30 days to provide a plan acceptable to the court.

103 Subject to providing a suitable plan, the plaintiffs have satisfied me that they can fairly and adequately represent the interests of the class on the conspiracy, fraudulent misrepresentation and *Competition Act* claims, without conflicts in interest on the common issues and, consequently, meet the requirements of s. 5(1)(e).

D) Additional Issues

104 Certain of the defendants have raised issues relating to security for costs. The court has been advised that a motion for security for costs will be launched in the future depending on the outcome of this motion. A consideration of this issue here is, therefore, premature.

105 The submissions of certain defendants relating to stays of other future proceedings are likewise premature

Part II - SNC-Lavalin Group - Carom II Action

The Plaintiffs

106 Donald Carom is removed as a representative plaintiff for the reasons given in the Bre-X-Carom I action. The plaintiff 662492 Ontario Limited is described more fully in my reasons above in that action.

The Claim

107 The plaintiff asserts claims in negligence, negligent misrepresentation and in breach of the *Competition Act*.

The Defendants

108 SNC-Lavalin Group Inc. is a publicly traded Canadian corporation with its head office in Montreal, Quebec. The other defendants in this action, SNC-Lavalin Inc., Kilborn Engineering Pacific Ltd., Kilborn-SNC-Lavalin Inc. and P.T. Kilborn Pakar Rekayasa are alleged to be subsidiaries of SNC-Lavalin Group Inc. The companies operate on a worldwide basis providing, among other services, engineering and project management particularly to mining and metallurgical industries nationally and internationally.

Facts

109 On or about June 9, 1995, a Bre-X controlled company, P.T. Westralian Atan Minerals, retained P.T. Kilborn Pakar Rekayasa, to furnish a study in connection with the Busang gold project in the Province of East Kalamantan, Indonesia. The services, which were provided by Kilborn to Bre-X pursuant to the contract, were "such research and investigation as may be required by the Client relating to the economic development of the Project and shall furnish a pre-feasibility report with Kilborn's opinion as to same". Kilborn was to perform these services "... in accordance with its own or agreed upon methods, subject to compliance with the specifications, documents and information supplied by the Client" in the capacity of an independent contractor.

110 The contract between Kilborn and Westralian (Bre-X) contained, *inter alia*, a clause excluding Kilborn from any liability in either contract or negligence "to the Client or to any third party" arising from the disclosure by the Client of any part of the study provided by Kilborn pursuant to the contract.

111 The Kilborn group of companies, including P.T. Kilborn Pakar Rekayasa, were acquired by the SNC-Lavalin Group Inc. in March 1996. For ease of reference in these reasons, I will refer to the defendants in this action collectively as SNC.

The Theory of the Plaintiff

112 The plaintiff's case rests on the publication by Bre-X of statements attributable to SNC, in press releases and other public statements, which were disseminated to the public generally. It is asserted that SNC is liable to any investor with knowledge of SNC and who suffered a net loss in the trading of Bre-X shares. The plaintiff states that SNC was negligent in the preparation of resource calculations, reports and studies, which were prepared for and submitted to Bre-X, portions of which were included in various Bre-X press releases. The SNC material, it is said, validated or confirmed the proposition which the plaintiff attributes to Bre-X, that is that "there is gold in mineable quantities in Busang". The plaintiff further contends that SNC, notwithstanding the contractual non-publication clause, acquiesced in Bre-X publishing this data when SNC knew or ought to have known that the class members would rely upon it. In consequence, the plaintiff pleads, as against SNC, causes of action in negligence, negligent misrepresentation and breach of the *Competition Act*.

113 To particularize these allegations, the plaintiff refers to some 15 public statements of Bre-X commencing on or about August 14, 1995 and ending with the statement of February 17, 1997 which contain statements attributed to SNC relating to "feasibility studies" and "resource calculations". In addition, the plaintiff identifies seven of the Bre-X statements which contain resource calculations performed by SNC in respect of the gold deposits in the Busang.

114 On March 26, 1997, the date on which Strathcona informed Bre-X of the possibility of tampering with the drill cores and Freeport-McMoran advised that it had been unable to find any significant amounts of gold in the Busang, SNC issued a press release entitled "Clarification on the Busang Project". This release stated in part:

> Bre-X Minerals Ltd. issued a press release earlier today in which it states: "that there appears to be a strong possibility that the potential gold resources on the Busang project in East Kalimantan, Indonesia have been overstated because of invalid samples and assaying of those samples."
>
> Over the past three years, P.T. Kilborn Pakar Rekayasa carried out resource studies and modelling based on geological data, sample and assay information provided to it by Bre-X. The conclusions and recommendations provided in the various studies are believed to be prudent and reasonable and are founded on calculations and observations that were performed to accepted industry standards. The resulting resource calculations showed that the gold resources at Busang, in all categories, were 889 million tonnes at an average grade of 2.48 grams gold per tonne for a total of 70.95 million ounces of gold.
>
> However, these calculations are dependent on the validity of samples and assaying of those samples. P.T. Kilborn Pakar Rekayasa did not drill, did not take samples nor did it assay those samples. The scope of its mandate from Bre-X relates to resource studies and modelling.

115 The plaintiff concedes that this press release, and other information about Bre-X which became public on March 26, should have put all investors or potential investors on notice about the problems with the Bre-X project in the Busang. Consequently, the class period proposed for certification terminates on the date of the announcement, March 26, 1997.

Class Definition

116 The plaintiff proposes that the class be defined as follows:

> Persons in Canada who purchased shares of Bre-X Minerals Ltd. between June 9, 1995 and March 26, 1997 and suffered a net loss.

117 Alternatively, they submit the following:

> Persons in Canada, who with knowledge of the substance of the written Bre-X press releases referring to Kilborn, Kilborn Engineering and Kilborn SNC Lavalin, purchased shares of Bre-X between June 9, 1995 and March 26, 1997 and suffered a net loss.

118 The plaintiffs propose that either definition will be subject to the following exclusions:

> Excluded from each class and subclass in each of the actions are defendants in any of the actions, members of the immediate family of any of the defendants in any of the actions, any subsidiary or affiliate of any defendant in any of the actions, any entity of which any excluded person has a controlling interest and the legal representatives, heirs, successors and assigns of any excluded person and any person who worked in the research department of a broker defendant and worked on an analysis of Bre-X at any time.

A) Common Issues

119 The third element in the test for certification is whether the claims or defences of the class members raise common issues. Common issues, by definition are "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

120 The common issue must have a basis in the cause of action asserted. As stated, the plaintiff advances claims in negligence, negligent misrepresentation and under the *Competition Act*. The plaintiff conceded in argument that the essence of all three claims is misrepresentation.

i) Negligence and Negligent Misrepresentation

121 The existence of a duty of care is pivotal to a claim in negligence or negligent misrepresentation. Absent a duty of care, neither the negligence of the defendant, nor the liability to the plaintiff for damages can be established. As stated by Linden in *Canadian Tort Law*, 6th Ed. (Toronto: Butterworth's, 1997) at 271:

> However negligent defendants are they will not be held liable unless they owe a duty to be careful. In other words, if the law does not recognize any obligation to exercise caution, actors are not responsible civilly for their carelessness.

122 LaForest J. affirmed the importance of the existence of a duty of care in the context of negligent misrepresentation in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at 184:

> Needless to say, actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses; ... In light of my disposition in the duty of care issue, however, it is unnecessary to inquire into this matter here — *the absence of a duty of care renders inconsequential the question of actual reliance*. (Citation omitted, emphasis added.)

As Major J. stated categorically in *Ryan v. Victoria (City)* (1999), 168 D.L.R. (4th) 513 (S.C.C.) at 524, "where there is no duty, there is no negligence."

123 The plaintiff contends that the statements made by Bre-X to the public, and hence, they say, to potential investors, which in turn attributed certain statements to the SNC Group, had their origin in the negligent acts of SNC. The plaintiff points to the March 26, 1997 press release by SNC-Lavalin to support its contention that the duty of care owed by SNC is, first, a duty of care to the general public and, second, that the consequent standard of care owed ought to be determined on an objective basis.

124 SNC stated, in part, in the March 26 press release regarding Bre-X that the "conclusions and recommendations provided in the various studies are believed to be prudent and reasonable and are founded on calculations and observations that were performed to accepted industry standards." The plaintiff contends that the statement, and the standard referred to therein, provide an objective basis from which the SNC's duty and standard of care to the plaintiff class can be determined. The plaintiff states that because there is an objective basis for determining both the duty of care and the standard of care that does not depend on any evidence from the individual class members, the determinations of the duty of care and standard of care are common issues that can be decided at a single trial.

125 I cannot accede to the plaintiffs contention that the basis for either the duty of care or the standard of care can be determined simply by reference to the press release and the objective standards expressed therein. First, in a misrepresentation case, or in a negligence case regarding economic loss generally, the duty of care is not to the world at large. In order to determine whether the duty exists, an analysis of the particular circumstances must be undertaken. Secondly, any standard of care which may be taken from the statement in the press release is not applicable as between SNC and the plaintiff class. Rather, it is the standard of care which inheres to the relationship between SNC and Bre-X.

126 Having rejected the plaintiff's proposition based on the March 26, 1997 SNC press release, the question remains as to whether any other basis exists upon which the duty of care could be determined as a common issue as between the plaintiff class and SNC or if there are any other common issues arising out of the causes of action asserted.

127 The plaintiffs state that the following common issues arise in respect of the claims in negligence and negligent misrepresentation:

> 1. Does Busang contain gold in commercial quantities or in quantities sufficient to make the mining of it commercially viable ("gold in mineable quantities")?
>
> 2. Was Bre-X operating a legitimate business?
>
> 3. Were the core samples salted? If so, when, where and by whom?

4. What work did SNC-Lavalin Group Inc., SNC-Lavalin Inc., Kilborn Engineering Pacific Ltd., Kilborn SNC-Lavalin Inc. and P.T. Kilborn Pakar Rekayasa, or any of them, do for Bre-X? Was the work done negligently or were the conclusions and recommendations prudent and reasonable and founded on calculations and observations that were performed to acceptable industry standards?

5. Did Bre-X follow generally accepted mining exploration practices and techniques? If not, how did it deviate and was any deviation reasonable under the circumstances?

6. Did Bre-X, Bresea and the Insiders, or any of them, conspire to inflate the price of Bre-X and Bresea shares? If they did, what are the particulars of the conspiracy?

7. Did the defendants, or any of them, know or ought they to have known the answers to questions 1,2,3,5 and 6? If so, who knew or ought to have known what, when and why, and what should they have done, if anything?

8. Did the defendants, or some of them, authorize, approve, or acquiesce in Bre-X making the written statements to the public referring to Kilborn, Kilborn Engineering and Kilborn SNC Lavalin ("Press Releases") so that, in law, it or they too made the statements? If the answer is yes, why?

14. Do the defendants, or some of them, owe a duty of care to the Class Members and, if so, did they breach the requisite standard of care?

15. Were the resource calculations, other data, reports and studies attributed to "Kilborn Engineering" and "Kilborn SNC Lavalin":

(a) representations made to the public by or on behalf of the defendants or some of them or acquiesced in by the defendants or some of them?

(b) representations that "there is gold in mineable quantities in Busang"?

(c) representations that were made to the public by or on behalf of the defendants or some of them without exercising reasonable care and attention? and

(d) representations made to induce the Class Members to purchase Bre-X shares?

128 When these proposed common issues are analyzed, it is apparent that the threshold issue is number 14 — whether SNC owed a duty of care to the plaintiff class in the present case. In the absence of a determination that there was a duty of care, any resolution of the other issues would be meaningless and would not advance the litigation. If the duty of care is not a common issue as between the defendants and the plaintiff class, none of the other issues can be considered common issues for the purposes of the *CPA*.

129 Common causes of action do not necessarily raise common issues of fact or law. In order for an issue of law to be a common issue for the purposes of a class proceeding, it must arise from "common, though not necessarily identical facts" because determinations made at a common issue trial in a class proceeding bind all of the class members and the defendants by operation of s. 27(3) of the *CPA*. Therefore, a determination of whether there is a duty of care owed to the plaintiff class by the defendants could result in an injustice to either party if such a determination were made outside of the factual framework in respect of which it would be dispositive. In keeping with the scheme of the *CPA*, the facts must be "common, but not necessarily identical" to all of the class members.

130 Class proceedings involving multiple plaintiff cases have been certified in the following instances: a) a mass tort arising from a single event (see *Bywater*); b) product liability where there is a product with a sole purpose use irrespective of the characteristics of the individual plaintiff (see *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.)), *Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (B.C. C.A.)); or c) misrepresentation

cases with a known plaintiff class and common misrepresentations to the class (*Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 (Ont. Gen. Div.)). In each of these cases, there is a defining element of commonality from which the common issues arise.

131 In *Bywater*, all members of the class were exposed to smoke in a subway tunnel fire. *Nantais* concerned defective pacemaker leads supplied to a known plaintiff class. Similarly, *Chace* was a class action commenced on behalf of an identifiable plaintiff class that had purchased potential defective bathroom fixtures manufactured by the defendant. In *Peppiatt* the class members were the victims of common misrepresentations.

132 At issue in the instant action is whether the defining element of commonality is present so that a duty of care as between the defendants and the plaintiff class can be established at a common issue trial. The importance of commonality was addressed by the British Columbia Court of Appeal in *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C. C.A.) at 18:

> The question of commonality of issues lies at the heart of a class proceeding, for the intent of a class proceeding is to allow liability issues to be determined for the entire class based on a determination of liability of the defendants to the proposed representative plaintiffs.

133 Upon first impression the instant proceeding appears to have an element of commonality. The plaintiff alleges, on behalf of the proposed class, that the defendant was negligent in performing the work for Bre-X. The allegation of negligence appears to be common to the plaintiff class and independent of the individual characteristics of the class members. However, closer scrutiny reveals that the duty of care, which is stated to be a common issue, requires instead an analysis of the individual circumstances of each member of the proposed plaintiff class.

134 The test for determining whether a duty of care exists between a particular defendant and a particular plaintiff was enunciated in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.). The Supreme Court of Canada adopted, and expanded, this test in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.). In *Hercules*, the *Anns/Kamloops* test is set out by LaForest J. He states at 184-5:

> It is now well established in Canadian law that the existence of a duty of care in tort is to be determined through an application of the two-part test first enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), at pp. 751-52:
>
>> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. ...
>
> In *Kamloops*, supra, at pp. 10-11, Wilson J. restated Lord Wilberforce's test in the following terms:
>
>> (1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so, (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?
>
> As will be clear from the cases earlier cited, this two-stage approach has been applied by this Court in the context of various types of negligence actions, including actions involving claims for different forms of economic loss.

135 LaForest J. summarizes the *Anns/Kamloops* test as follows at 186:

> ... whether ... a duty of care [is owed] ... will depend on (a) whether a *prima facie* duty of care is owed, and (b) whether that duty, if it exists, is negatived or limited by policy considerations.

136 The first aspect, a *prima facie* duty of care, is dependent on the "proximity" of the plaintiff and the defendant. LaForest J. states at 200:

> A *prima facie* duty of care will arise in the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff in the circumstances would be reasonable.

137 The primary policy reason for limiting the liability of defendants is addressed by LaForest J. at 192:

> ... the fundamental policy consideration that must be addressed in negligent misrepresentation actions centres around the possibility that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." (Citation omitted)

138 In *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (U.K. H.L.), Lord Bridge illustrates the danger inherent in grounding liability for a negligent misrepresentation simply on the establishment of a *prima facie* duty of care. He states at 576:

> To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose from which they may choose to rely on it is not only to subject him ... "to liability in an indeterminate amount for an indeterminate time to an indeterminate class" ... it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.

139 Lord Bridge then discusses the need for a "limit or control mechanism". He states, also at 576, that this "mechanism" would exist:

> ... in the necessity to prove ... as an essential ingredient of the "proximity" between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind.

140 In *Hercules*, LaForest J. surveys a number of cases, including *Anns, Kamloops* and *Caparo*, and concludes at 198 that a finding of an actual duty of care would occur "in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for they were made...". He states that, in those cases, "policy considerations will not be of any concern since the scope of liability can readily be circumscribed ... and a duty of care may be found to exist."

141 To summarize the development of the law through *Anns, Kamloops* and *Hercules*, a duty of care which overrides any policy limitations will exist in a negligent misrepresentation or negligence case where the following four elements are present:

> (a) the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation;
>
> (b) that reliance by the plaintiff in the circumstances was reasonable;
>
> (c) the defendant knew the identity of the plaintiff (or of a class of plaintiffs);
>
> (d) the defendant's statements were used for the specific purpose or transaction for which they were made.

141 A *prima facie* duty of care will exist where elements (a) and (b) are present. This is a low threshold. In *Caparo*, Lord Oliver states at 587:

> In general, it may be said that *when any serious statement*, whether it takes the form of a statement of fact or advice, *is published or communicated, it is foreseeable that the person who reads or receives it is likely to accept it as accurate and to act accordingly*. It is equally foreseeable that if it is inaccurate in a material particular the recipient who acts upon it may suffer a detriment which, if the statement had been accurate he would not have undergone. (Emphasis added.)

Similarly, Major J. states in *Ryan* at 525:

> The first step of the *Anns/Kamloops* test presents a relatively low threshold. In order to establish a prima facie duty of care, it must be shown that a relationship of "proximity" existed between the parties such that it was reasonably foreseeable that a careless act by the [defendant] could result in injury to the [plaintiff].

142 To find an actual duty of care, the facts must demonstrate that (c) and (d) exist as well, or policy concerns relating to indeterminate liability may well inhere and override the *prima facie* duty of care. As stated in *Ryan* at 525:

> The second step of the *Anns/Kamloops* test requires that it be determined whether any factors exist which should eliminate or limit the duty found under the first branch of the test. This approach recognizes that while the test of "proximity" may be met, liability does not necessarily follow. The existence of a duty of care must be considered in light of all relevant circumstances...

143 It is within this legal framework that the plaintiff proposes that the duty of care of the defendants to the plaintiff class is a common issue that can be established at a single trial where the representative plaintiff will be the only participant from the plaintiff class. I cannot accede to this submission. While the plaintiff may be able to establish a *prima facie* duty of care on behalf of the class, there is an individual issue in respect of whether there are policy considerations which should override the *prima facie* duty. Since the policy considerations are an essential element in the finding of a duty of care, then the determination of a duty of care is an individual issue.

144 Bre-X engaged SNC (Kilborn) to audit the results of a gold mining project in Indonesia. SNC was a prominent engineering company with an international reputation and experience in the mining field. Bre-X explicitly stated or implied, in 15 press releases made over a 20 month period, that SNC, was verifying the results being obtained at the Busang. Bre-X provided excerpts from the studies produced by SNC in the press releases. The statements attributed to SNC in the Bre-X press releases are "serious statements" which contain no indicia of inaccuracy. SNC made no public statements either disclaiming or qualifying the statements made by Bre-X during the 20 months. In fact, there were 15 press releases made before SNC issued a clarification or disclaimer regarding the scope of the work it was doing for Bre-X.

145 In light of the facts and the low threshold, and notwithstanding the protestations of SNC in its March 26, 1997 disclaimer, a resolution of whether a *prima facie* duty of care exists between the defendants and the plaintiff class could be achieved at a common issue trial without participation of the individual class members and without procedural prejudice to the defendants or to the plaintiffs.

146 However, the fact that the *prima facie* duty of care owed by the defendants to the plaintiff class could be determined at a common issue trial does not end the inquiry into whether there are common issues. First, common issues, in the context of a class proceeding, must be capable of advancing the litigation in a legally material way. Here, the low threshold for a finding of a *prima facie* duty of care militates against a significant advancement of the litigation on a mere finding that such a duty exists. Secondly and more importantly, the concerns about indeterminate liability are to be addressed in determining whether a duty of care exists. LaForest J. states in *Hercules* at 196:

> ... the prospect of burgeoning negligence suits raises serious concerns, even if we assume that the arguments positing proof of negligence and reliance as a barrier to liability are correct. In my view, therefore, *it makes more sense to circumscribe the ambit of the duty of care than to assume that difficulties in proving negligence and reliance will afford sufficient protection [to defendants]* ... (Emphasis added.)

147 Though he was addressing concerns relating to the auditor defendants in *Hercules*, LaForest J.'s comments have general application in negligence and negligent misrepresentation cases. (See *Ryan*; *Dorman Timber Ltd. v. British Columbia* (1997), 152 D.L.R. (4th) 271 (B.C. C.A.), *Black v. Lakefield (Village)* (1998), 166 D.L.R. (4th) 96 (Ont. C.A.)).

148 Thus, to determine an actual duty of care, the analysis must proceed beyond the finding of a *prima facie* duty. Having so found, the court must consider whether there are any policy reasons which should serve to limit the duty. In the present case, the risk of "liability in an indeterminate amount" cannot be understated. The press releases were made to the world at large. In the absence of the plaintiff being able to establish at the common issue trial that the additional factors, (c) knowledge of the plaintiff class, and, (d) use of the information for the specific purpose for which it was prepared, are present, the policy concerns would override any finding of a duty of care between the proposed class and the defendants.

149 In consequence, the representative plaintiff must establish that the plaintiff class was known to the defendants. The plaintiff proposes a vast, national, amorphous class. It may be argued that a class of this nature is not contemplated by either *Hercules*, *Caparo* or other similar cases. However, without presuming to decide the merits, the facts alleged are that the defendant allowed its information to be included in the press releases of Bre-X. There was nothing surreptitious about the press releases. In fact their publication to the world at large goes to the heart of the plaintiff's claims. A finding could be made at a common issue trial as to whether SNC was aware that its information was being disseminated by Bre-X. In the result, even though the class is vast, if the defendants knowledge can be established, the class affected could be found to be foreseeable to the defendants. For this purpose, no participation by the class members other than the representative plaintiff would be required.

150 The final criterion which must be determinable at a common issue trial in order to establish a duty of care is whether the information provided by the defendant was used by the plaintiff class for the "specific purpose" for which it was prepared. Absent this, the duty of care is not a common issue.

151 SNC's contract with Bre-X was to perform "such research and investigation as may be required by the Client relating to the economic development of the Project and shall furnish a pre-feasibility report with [SNC's] opinion as to same." Nowhere within this clause is there an indication that the information would be distributed to anyone other than Bre-X, nor is there any evident contemplation that it would be used by anyone to determine if Bre-X shares were a sound investment. On its face, this clause is not capable of supporting an allegation that the specific purpose for which the reports were prepared was to enable investors to decide if they should purchase Bre-X stock.

152 In order to bring itself within the parameters of the four element enunciation of the duty of care test in *Hercules*, the plaintiff advances the theory that the purpose for which SNC provided the information to Bre-X was materially altered by SNC's acquiescence in the distribution of the information by Bre-X to the general public. This acquiescence, it is contended, means that the purpose for which the information was prepared was to allow potential investors to evaluate an investment in Bre-X stock. The plaintiff submits that it and, by extension, the class members, did in fact use the information for this purpose and therefore an actual duty of care arises.

153 The plaintiff's submission is not, however, borne out by its own evidence. 662 Ontario is controlled by Ivo Battistella. He made all of the investment decisions of the company. Battistella was cross-examined concerning the trading activities of 662 Ontario. The picture that emerges from his evidence is that of a sophisticated trader employing complicated strategies to take advantage of fluctuations in the price of Bre-X stock.

154 662 Ontario maintained trading accounts at Nesbitt Burns. The information provided to Nesbitt on the account form for one of these accounts, 41509069, was revised on January 10, 1996. At that time, 662 Ontario reported extensive investment experience in all types of investments save commodities and futures. In addition, the investment guidelines were modified to 100% aggressive trading and the recorded risk tolerance was listed as "high". Over an 11 month period, from May 1996 to April 1997, 662 Ontario executed 57 transactions through this account with Nesbitt. 35 of the

transactions were purchases and 22 were sales. Throughout the 11 month period, 662 Ontario made at least one purchase and one sale of Bre-X shares each month.

155 662 Ontario also engaged in "trading on the market fluctuation". In those instances, Bre-X shares were bought and sold in the same day or over two days in an attempt to realize a profit on minor fluctuations in the share price. Additionally, 662 Ontario employed a strategy of trading in options for Bre-X Stock, conducting 231 such transactions through the 11 month period. As a result of this strategy, at the end of October 1996, the company had sold 45 uncovered calls on the stock. The significance of this is that an uncovered call exposes the seller to unlimited risk if the price of the stock is rising. Battistella's explanation for the uncovered call position was that it was a mistake, that he never knew he was uncovered. Additionally, the plaintiff concedes that the fraud was publicly known on March 26, 1997. Nevertheless, 662 Ontario purchased 2000 shares of Bre-X stock 5 days later on March 31, 1997.

156 The essential common issue proposed here is the question of whether a duty of care arises between the plaintiff class and the defendants. The plaintiff argues that any policy limitations circumscribing the duty of care in tort should not be a barrier because the plaintiff class was known to the defendants and that class used the information provided by the defendants for the specific purpose for which it was prepared.

157 This latter contention, as stated, is contrary to the evidence. 662 Ontario actively engaged in both purchases and sales of Bre-X during an 11 month period. It exposed itself to unlimited risk in the event of a rise in the price of Bre-X stock through its option trading. The evidence of 662 Ontario illustrates that, even on the altered purpose theory advanced by the plaintiff, any determination as to whether the SNC information in the Bre-X press releases was "used for the specific purpose" for which it was prepared must of necessity be an individual inquiry. Thus, the duty of care cannot be a common issue.

158 Furthermore, the plaintiff's altered purpose theory is based on the following four assumptions:

a) that the Kilborn and SNC names were known to all of the class members;

b) that the class members shared a common regard for the quality of work and the reputation enjoyed by Kilborn or SNC;

c) that one representation containing a reference to a Kilborn or SNC calculation would have been enough to cause the class member to purchase the Bre-X shares; and,

d) that the statements as to the amount of gold caused all of the class members to value the Bre-X stock in the same way.

159 Simply put, on the evidence of the representative plaintiff, these assumptions are unfounded. At their highest, these are live issues as between the defendants and the individual plaintiffs which must be decided at trial. To accept these assumptions for the purpose of creating a common issue would result in serious procedural prejudice to the defendants.

160 In summary, I cannot accede to the submission that the duty of care is a common issue. A decision on the ultimate element in the *Hercules* test is necessary for a determination of a duty of care where policy concerns exist in respect of indeterminate liability. It is clear from the evidence that such a determination must be made on an individual basis.

161 The *CPA* anticipates the present circumstance by requiring that a common issue of law must arise out of "common, though not necessarily identical" facts. A resolution of the common issues at a common trial binds all members of the class and the defendants. Such a decision on an issue of law, if arrived at out of its factual context, will result in an injustice to either plaintiff or defendant and is contrary to the definition of a common issue in the *CPA*. In the result, I find that there are no common issues which arise from the claims in negligence or negligent misrepresentation.

ii) The Competition Act Claim

162 The plaintiff states that the following common issues arise from the claim for the breach of the *Competition Act*:

> 8. Did the defendants, or some of them, authorize, approve, or acquiesce in Bre-X making the written statements to the public referring to Kilborn, Kilborn Engineering and Kilborn SNC Lavalin ("Press Releases") so that, in law, it or they too made the statements? If the answer is yes, why?
>
> 9. Were the Press Releases false and misleading in a material respect? If the answer is yes, why?
>
> 10. What is the meaning of the words "as a result of" in section 36 of the *Competition Act*?
>
> 11. Does the *Negligence Act* or the concept of contributory negligence apply in assessing loss or damage under the *Competition Act* cause of action?
>
> 12. Must the plaintiffs prove an anti-competitive component to the *Competition Act* cause of action? If so, have they? Does Part VI apply to behaviour which is not anti-competitive?
>
> 13. Should the full costs of investigation in connection with this matter and the costs of the proceedings or part thereof be fixed or assessed on a global basis under the *Competition Act* and, if so, who should pay and in what amounts?
>
> 16. Was the publication of the resource calculations, other data, reports and studies a breach of section 52 of the *Competition Act* giving rise to liability on the part of the defendants or some of them pursuant to section 36, if the Class Members can prove damages resulted?

163 The common issues as proposed by the plaintiff deal with aspects of both s. 52 and s. 36 of the *Competition Act*. However, s. 52 proscribes certain activities, namely misrepresentation of products, including business interests, and sets out the criminal liability for such activities. It does not contemplate civil plaintiffs. The plaintiff's claim is based on the civil remedy set out in s. 36 of the *Competition Act*. This remedy is available to plaintiffs who claim to have suffered a loss "as a result of" conduct by defendants which breaches other provisions, in this case s. 52, of the statute.

164 It is apparent that the key issue to be resolved in an action based on s. 36 of the *Competition Act* is whether the members of the plaintiff class suffered a loss "as a result of" the conduct of the defendants. The plaintiff concedes that this, and the quantum of any loss, are issues which must be determined on an individual basis.

165 The defendant argues that the issues raised by the plaintiff are issues of law which do not arise from common facts. I disagree. The proposed common issues are of mixed fact and law, and arise from a common factual background. Though a resolution of the issues will not be dispositive of the claims, such a resolution would be capable of advancing the litigation.

B) Preferable Procedure

166 I have found that the plaintiff has not raised any common issues regarding the claims in negligence or negligent misrepresentation. In any event, even if such issues were present, I would not have considered a class proceeding to be the preferable procedure for dealing with those claims.

167 The genesis of the present *CPA* is found in the *Report of the Attorney General's Advisory Committee on Class Action Reform*. The *Report* states, at 6, that:

> ... any procedure developed should treat plaintiffs and defendants in a fair and equitable manner and should not impose any unnecessary burdens on the courts,

168 The discussion regarding the choice of the term "preferable procedure" is instructive. The *Report* states at 32:

> The Committee ... selected the word "preferable" over other words such as "reasonable" or "superior", as it was thought that the word "preferable" would best draw the court into a consideration of whether or not the class proceeding was a *fair, efficient and manageable method of advancing the claim*. The class proceeding should also be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on. (Emphasis added.)

169 A court must consider whether a class proceeding is the preferable procedure in light of the goals of the *CPA*, namely, judicial economy, access to justice and behaviourial modification of wrongdoers. This requires an analysis of the common and the individual issues present in the proceeding. As stated in *Bywater* at para. 26:

> In determining whether the class proceeding is the preferable procedure, the court does not inquire as to whether the common issues predominate the individual issues. The predominance test has been rejected by Ontario courts. Instead the proper approach is to weigh all of the relevant factors, including the common issues and the individual issues in the context of the goals of the Act.

170 As stated, there is no predominance test incorporated into the *CPA*. An action might well be suited for a class proceeding where the individual issues predominate over the common issues on a simple numerical basis. However, the fairness, efficiency and manageability of a class proceeding are all affected where the substance and complexity of the individual issues overwhelm the common issues.

171 In this action, the factual matrix of the claims advanced by the plaintiff in negligence and negligent misrepresentation demonstrate the difficulties in advancing those claims in a fair, efficient and manageable manner in a class proceeding.

172 The *CPA* is a procedural statute which neither adds to nor detracts from substantive rights. The torts of negligence and negligent misrepresentation cast a wide net. The Supreme Court of Canada has seen fit to incorporate policy considerations to limit the duty of care, and thus liability, for potential defendants. What is contemplated is clear from the words of LaForest J. in *Hercules* at 190:

> As I have already tried to explain determining whether [a special relationship] exists on a given set of facts consists in an attempt to discern whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business. Requiring in addition to [a special relationship], that the defendant know the identity of the plaintiff (or class of plaintiffs) and the plaintiff use the statements in question for the specific purpose for which they were prepared amounts, in my opinion to a tacit recognition that considerations of basic fairness may sometimes give way to other pressing concerns. Plainly stated, adding further requirements to the duty of care test provides a means by which policy concerns that are extrinsic to simple justice — but that are, nevertheless, fundamentally important — may be taken into account in assessing whether the defendant should be compelled to compensate the plaintiff for losses suffered.

173 The proposed common issues in negligence and negligent misrepresentation arise only if certain assumptions, which I have identified in my analysis of the common issues, are made. These assumptions circumvent factual inquiries by the defendants which might otherwise serve to limit the class to whom a duty of care, if any, is owed. Policy considerations demand that the defendants be permitted to make these inquiries at the point at which a duty of care will be determined. This raises individual issues in the proposed common issue trial which alone militates against a class proceeding as the preferable procedure.

174 Moreover, the plaintiff concedes that the issues of reliance, causation and damages, must be determined in individual trials. Consequently, the individual proceedings will, in themselves, be complex and lengthy. The determination of reliance will require an inquiry into the investor - investment advisor relationship, the investor profile, the class member's awareness of any statements made by the defendants, any additional information concerning Bre-X of which the class member may have been apprised, the source of any such additionl information, the specific trading

activity of the class member and its correlation to the representations, the class member's knowledge of the business or reputation of the defendants and the class member's objectives in purchasing Bre-X stock. It is not reasonably foreseeable that these issues, and any others which may arise in the individual proceedings, will be decided in a brief inquiry.

175 Notwithstanding any policy considerations regarding the defendants, the scope of the class and the myriad of relationships included within it, make it impossible for a single plaintiff to fairly represent the class in a common issue trial. Elaborate subclasses, and appropriate representative plaintiffs, would be required to prevent an unfair determination for those plaintiffs whose factual circumstances are not common with those of the proposed representative plaintiff.

176 Additionally, the plaintiff has proposed a Canada-wide class comprised of every conceivable type of entity and individual trading in the stock market. In conceding that individual trials are necessary, the implicit corollary is that these trials must either be coordinated throughout the entire country, or alternatively, conducted in Ontario with the attendant costs to the class members from out of the province.

177 In summary, it is impossible to conceive of a method in which the negligence or negligent misrepresentation claims of the plaintiff class could be advanced fairly, efficiently or manageably through a class proceeding. Judicial economy would not be enhanced and the ability of the class members to attain access to justice through such a procedure is, at best, suspect. Additionally, the goal of behaviour modification suffers where lengthy individual proceedings involving each class member have to be undertaken prior to a determination of liability on the part of the defendants.

178 I have found common issues to exist in respect of the claim under the *Competition Act*. However, I do not consider a class proceeding to be the preferable procedure for resolving these issues. In addition to the reasons stated above, I reject a class proceeding as the preferable procedure for resolving the common issues arising from the claim under the *Competition Act* for the following reasons.

179 Earlier, in the Bre-X-Carom I action, I quoted from the reasons of O'Brien J. in *Abdool*. Those reasons bear repeating here. He stated at 461:

> I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation.
>
> In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing certification.

180 In the case of the *Competition Act* claim, a common issue trial will not resolve the key issue as between the defendants and the plaintiff class, namely, whether any loss that the class members suffered was "as a result of" the actions of the defendants. That issue, along with the actual losses suffered, will have to be established in individual trials. There are a variety of plaintiffs and a plethora of individual circumstances necessitating, as in the negligence and negligent misrepresentation claims, complex, lengthy individual proceedings. This neither serves the goal of judicial economy nor does it enhance the access to justice for the plaintiffs.

181 The instant situation is clearly distinguishable from that prevailing in the Bre-X-Carom I. The opportunity for efficiency presented in that action by a contemplated common issue trial on the conspiracy issues does not exist in the circumstances here. Thus, the preferability of a common issue trial in any of these claims must be determined on its own merits. In the result, a class proceeding does not represent the preferable procedure in resolving the common issues in the *Competition Act* claim.

C) Representative Plaintiff

182 In order to be certified as a class proceeding, an action must have a representative plaintiff who:

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

183 At issue on the final element for the test for certification is whether the representative plaintiff would adequately and fairly represent the interests of the class. In the present case, the trading activity of the representative plaintiff is idiosyncratic. This has two consequences: first, it produces no common issues; second, the representative plaintiff may not be able to meet the test of being able to adequately and fairly represent the class. While a representative plaintiff need not be typical, he or she cannot be so distinctive, in the face of the class definition, as to produce a result in law flowing from a common issue trial which could be more adverse to class members than an individual trial would be. Where the cause of action, or the common issues proposed, depend on individual characteristics of the plaintiff rather than a commonality within the class, then the approval of a distinctive plaintiff as the class representative works a manifest unfairness to the plaintiff class. This is the raison d'etre of the requirement for commonality which is the underpinning of the statute.

184 Moreover, the opportunity to opt-out is not an adequate answer to the uncertainty created by a distinctive plaintiff. The notice to class members cannot adequately explain the risk presented by the idiosyncracies of the representative plaintiff so as to deliver to the class members sufficient information to enable them to make an informed decision to opt-out or remain in the class.

185 The representative plaintiff does not meet the requirements of s. 5(1)(e). The statute requires that the plaintiff be able to "fairly and adequately" represent the class. The representative plaintiff cannot do so in this case. The nature of the claim, and the attendant focus on the individual characteristics, would renders this plaintiff incapable of representing the class proposed. Notwithstanding this defect, and without determining the merits of the claim, I note that the evidence of the representative plaintiff advanced on this motion runs contrary to the theory proof necessary for critical elements of the cause of action asserted.

186 662 Ontario is proposed as the representative plaintiff in three actions: the instant proceeding, the main Bre-X-Carom I action, and in the Nesbitt Burns subclass. In the *Manual for Complex Litigation, Third* (West Publishing, 1995) it is stated at 221:

> ... the representative plaintiff must be free of conflicts. The court should ensure that they understand their responsibility to remain free of conflicts and to "vigorously pursue" the litigation in the interests of the class...

In my view, this statement is apposite to these actions. The representative plaintiff must be able to prosecute the action on behalf of the class members that he or she represents without conflict. There is an inherent conflict in circumstances where the representative plaintiff is proposed in two actions which are inter-related, and the conduct of the defendants in one action may be advanced as a defence for the defendants in the other action. In such circumstances, the decisions made by the representative plaintiff may well be influenced by considerations of personal benefit, to the detriment of the class members in one of the actions. This is not acceptable.

187 Certain of the defendants raise the additional issue of whether a plaintiff can even be a member of one class while being a representative plaintiff in another. This is not necessary to decide in light of the disposition of the motions.

188 Finally, the litigation plan proffered is inadequate for the reasons set out in the Bre-X-Carom I action.

Part III - The Brokers Actions

189 There are five separate actions brought against five brokerage houses and the analysts employed by each of them who were responsible for research on Bre-X. In addition, two brokerage firms Nesbitt Burns and First Marathon and

the analysts employed by them are defendants in separate subclasses in the Carom I action. Because of the similarity of the claims against the brokerage houses and their analysts, all seven are dealt with together by agreement of the parties. Additionally, the parties have agreed that the evidence in any one of the actions may be considered in all of the other brokers actions.

1) Nesbitt Burns Subclass

The Plaintiffs

190 The proposed representative plaintiffs 662 Ontario and Shimizu have been described above in the Carom I action. They claim to have purchased shares in Bre-X, and suffered losses, as a result of the representations of Bre-X and Nesbitt Burns and its analyst, Egizio Bianchini.

Nesbitt Burns and Egizio Bianchini

191 Nesbitt Burns Inc. ("Nesbitt Burns") is a full-service investment bank and securities dealer that provides a variety of services to a broad array of clients including individuals, institutions, corporations and governments. The major organizational units of Nesbitt Burns include Private Client, Institutional Equity and Research. As of December 1997, the Nesbitt Burns Private Client division had 73 branch offices and 57 sub branches across Canada. The numbers are not substantially different than those during the times material to this action. As of January 1998 there were approximately 1,356 investment advisors employed in those branches. In addition, the Nesbitt Burns institutional sales office employed 23 representatives.

192 Egizio Bianchini ("Bianchini") is a research analyst and geologist employed by Nesbitt. He was regarded as a leading gold analyst. He personally visited the Busang properties. In his role as a research analyst he prepared and disseminated research reports relating to Bre-X on behalf of Nesbitt. The general procedure was to distribute these research reports to the investment advisors rather than individual retail clients. On occasion, the reports were forwarded to the individual clients directly. In addition, Bianchini led numerous Canada-wide conference calls with the investment advisors and preferred clients during which his opinions of Bre-X were proffered.

193 The plaintiffs allege that between August 17, 1995 and March 27, 1997, the Nesbitt Burns Research Department produced and disseminated at least 79 memoranda and reports, which include any reports attributable to Bianchini, relating to Bre-X.

2) First Marathon Subclass

The Plaintiff

194 The proposed representative plaintiff Schonberger is described more fully above in the reasons in the Carom I action. He claims to have purchased Bre-X shares and subsequently lost money as a result of the representations of Bre-X, First Marathon and its analyst, Kerry Smith.

First Marathon and Kerry Smith

195 First Marathon Securities Limited ("First Marathon") is a full service investment bank and securities firm with offices located in Toronto and elsewhere in Canada. The company provides services primarily to institutions. Individual, or retail, trading accounts constitute approximately 14% of First Marathon's business based on revenue. First Marathon asserts that its institutional focus differentiates it from most other financial service firms.

196 Kerry Smith ("Smith") is a prominent Canadian gold and research analyst employed by First Marathon. He visited the Busang properties and was responsible for the preparation and dissemination of research reports to First Marathon institutional clients. Smith also led numerous Canada-wide telephone conference calls to First Marathon clients during which Bre-X was discussed.

3) Levesque Beaubien Action

The Plaintiff

197 The proposed representative plaintiff, Fred Hines, is a resident of Ontario and client of Levesque Securities Inc. He purchased 1,000 shares of Bre-X on February 18, 1997 at an aggregate cost of approximately $23,000. He still holds the shares which are now worthless.

Levesque Beaubien and Michael Fowler

198 Levesque is one of Canada's six largest investment dealers with 65 branches located across the country. The company offers a spectrum of investment services to its clients ranging from acting as a clearing house to effect transactions through to providing research and investment advice. The personnel at Levesque through whom these services are provided include trading professionals, investment advisors and research analysts.

199 Levesque employs more than 730 investment advisors who deal directly with customers. The relationships between investment advisors and their clients vary greatly. In some relationships, the client depends heavily on the investment advisor for advice regarding the purchase or sale of securities. In other relationships, the client may act independently or, indeed, act contrary to the advice of the investment advisors.

200 Michael Fowler is a member of Levesque's research department who has expertise in a number of fields, including precious metals and mining. Fowler's research reports on Bre-X, and the opinions contained therein, were based on publicly available information including information from Bre-X itself. Fowler visited the Busang properties in April 1996.

201 Between August 25, 1995 and May 7, 1997, Fowler prepared and released more than 15 publications which contain comments about Bre-X, including a range of recommendations on the shares, from speculative buy, to mega strong buy, to hold, to sell at various times during the class period. These reports were generally sent to the investment advisors. On occasion, some were forwarded by the investment advisors to their clients.

4) The Midland Walwyn Action

The Plaintiffs

202 The proposed representative plaintiffs were clients of Midland Walwyn. Ronald Parent is a resident of Ontario who purchased Bre-X shares on three occasions in between June 1996 and February 1997 for an aggregate cost of approximately $113,000. He still holds the shares which are now worthless.

203 Gary D'Eathe is a resident of Ontario who purchased Bre-X shares for his Registered Retirement Savings Plan account on three occasions between December 14, 1996 and March 24, 1997 at an aggregate cost of approximately $13,000. He still holds the shares which are now worthless.

Midland Walwyn and Michael Jalonen

204 Midland Walwyn is a stock broker and investment dealer with over 140 different offices and branches located across Canada. In the affidavit of Marie Oswald, the Manager of Compliance of Midland Walwyn, she describes the business of the company and the relationships between its employees and clients in similar terms to those asserted by the defendant Levesque.

205 Michael Jalonen was a member of the Midland Walwyn research department. He had expertise in a number of fields including precious metals and mining. The Midland Walwyn research department reviews publicly available information, conducts analysis of certain companies issuing securities, and issues reports and analysis. It is asserted that

the information Jalonen used to compile research reports relating to Bre-X was publicly available, and further, originated largely with Bre-X itself.

206 Jalonen visited the Busang in July 1996, prior to initiating coverage of Bre-X later that month in his July 22, 1996 report. In all Jalonen prepared and released over 30 reports in various forms, containing opinions and recommendations relating to Bre-X. These reports were delivered primarily to investment advisors who, on occasion, distributed them to their clients.

5) The TD Securities Action

The Plaintiff

207 The proposed representative plaintiff, Kanta Mehta, was a client of TD Securities and a resident of Ontario. On January 15, 1997 she purchased 500 shares of Bre-X at an aggregate cost of approximately $11,785. She continues to hold the shares which are now worthless.

TD Securities and Ken Gillis

208 TD Securities is a stock broker and investment dealer which provides services through four major divisions:

a) Green Line Investor Services, a discount broker which deals with individuals and corporations. It operates from 41 branches and offices across Canada;

b) TD Evergreen, a full service broker to individuals and corporations, which operates from 54 branches across Canada;

c) Institutional Equities, which provides research services, and executes trades for approximately 160 institutions, operating from 2 branches; and

d) Correspondent Services, which provides trading, execution and back-office processing for other investment dealers, and operates from 3 branches.

209 Each of the divisions services a different type of clientele. Green Line's discount broker service does not include specific advice on specific securities. It operates as an order taker, effecting low cost transactions for its clients. As of May 31, 1998, Green Line had over 642,500 accounts. TD Evergreen is a full service broker, which employs a Staff of investment advisors who deal directly with clients. These investment advisors have access to the research and analysis conducted by TD Securities which they may or may not pass on to clients. There are approximately 137,860 Evergreen accounts. The Institutional Equities and Correspondent Services divisions deal with professional clients.

210 Ken Gillis was a member of TD Securities' research department who had expertise in a number of fields including precious metals and mining. The research department reviews publicly available information, conducts analysis of certain companies issuing securities, and issues reports and analysis, which are made available to clients, the Institutional Equities department, and to investment advisors in TD Evergreen.

211 The plaintiff alleges that the TD Securities Research Department produced and disseminated at least 21 memoranda and reports relating to Bre-X in the period between September 5, 1996 and April, 1997.

6) The ScotiaMcleod Action

The Plaintiffs

212 Adenat Corp. is a corporation with a head office in Brampton, Ontario. Israel Schwartz is the president of Adenat and is responsible for all its investment decisions. In a period spanning from May 13, 1996 to September 6, 1996, Adenat traded in Bre-X stocks through ScotiaMcleod, the end result of which was a loss of approximately $35,500.

ScotiaMcLeod and Ted Reeve

213 ScotiaMcleod is a registered full service broker and investment dealer with 88 branches, including sub-branches, located throughout Canada. It employs approximately 800 retail registered representatives, known as IEs, 35 individuals engaged in institutional equity sales and 30 research analysts who provide services to the clients of ScotiaMcleod. In particular, the IEs are responsible for servicing over 430,000 retail accounts maintained at ScotiaMcleod.

214 Ted Reeve has been a research analyst since 1981 and has been employed by ScotiaMcLeod since 1994. He is not licenced to trade in securities on behalf of ScotiaMcLeod's clients. It is alleged by the plaintiff that Reeve and other representatives of ScotiaMcLeod visited the Busang properties and that he was personally involved in preparing and disseminating the research reports relating to Bre-X to the clients of ScotiaMcLeod.

215 ScotiaMcLeod, through its Equity Research Department, collects publicly available information about companies. From this information, it prepares reports which it distributes to selected employees and clients in ScotiaMcLeod's Reports. ScotiaMcLeod does not, as a policy, require that its IEs follow any recommendations contained in the Reports. Rather, each IE is instructed to obtain detailed information from the client relating to the client's investment objectives, investment knowledge and experience and financial circumstances when opening a new account. From this, the IE will be able to meet the client's needs while satisfying regulatory requirements and be in a position to assess the suitability of transactions in the client's accounts from time to time. ScotiaMcLeod asserts that the service obligations cannot be performed on a generic or abstract basis but must be done individually.

216 The plaintiffs allege that during the period between October 2, 1995 and April 4, 1997, the ScotiaMcLeod Research Department produced and disseminated at least 27 memoranda and reports relating to Bre-X.

7) The CIBC Wood Gundy Action

The Plaintiffs

217 The proposed representative plaintiffs in the CIBC Wood Gundy Action are as follows. Celtic Mortgage Corp. is a corporation with its head office in Thornhill, Ontario. Its president is William Connors. Connors is also the president of Connors Investment Inc., a corporation which made all the investment decisions of Celtic. Celtic through the agency of Connors Investments, bought 6,800 shares of Bre-X on November 29, 1996 on a margin account with CIBC Wood Gundy Inc. When the shares were sold to cover a margin call on April 8, 1997, Celtic suffered a loss of approximately $36,000.

218 Marisue Gardonio is a resident of Ontario who purchased 1,000 shares of Bre-X at an aggregate cost of $25,550 through CIBC Wood Gundy on August 23, 1996 for her Registered Retirement Savings Plan. She continues to hold the shares which are now worthless.

219 Larry Freeman is a resident of Ontario who purchased Bre-X shares through CIBC Wood Gundy on 4 separate occasions between September 27, 1996 and April 4, 1997. The total cost of the shares was approximately $48,700. He continues to hold the shares which are now worthless.

CIBC Wood Gundy and Bruno Kaiser

220 CIBC Wood Gundy is an investment dealer which provides a full range of investment services to a range of clients which includes institutions, corporations and retail investors. The company has separate divisions servicing institutional and retail clients. Corporations, depending on their size and character may be dealt with through either the institutional or retail divisions. The contact between the client and CIBC Wood Gundy is, in the case of institutions, through a registered representative at the institutional trading offices, and in the case of a retail investor, through a financial consultant ("FC") at a branch office. The nature of any particular relationship is dependent upon the specific

client, and thus may vary from a mere conduit for the processing of the client's orders to portfolio management by the FC through a discretionary account.

221 Bruno Kaiser was the research analyst assigned to cover Bre-X by CIBC Wood Gundy. The reports of the research analyst, which may contain opinions and recommendations, are disseminated to CIBC Wood Gundy's registered representatives and FCs. These reports are often forwarded directly to institutional clients. Typically, research reports are not sent directly to retail clients. The recommendations contained in the reports are based on the information which is available at the time of the issuance of the report. That information is subject to change and therefore the reports are time-sensitive. To keep research current, CIBC Wood Gundy also issues daily "Research Highlights" memos to its registered representatives, FCs and institutional clients which provide brief updates on selected companies.

222 The plaintiffs allege that the CIBC Wood Gundy research department produced at least 30 memoranda and reports relating to Bre-X during the period between May 24, 1996 and February 24, 1997.

223 The brokerage defendants refer to the employees responsible for direct contact with their clients variously as investment advisors, registered representatives, financial consultants or otherwise. For the purpose of these reasons, I will use the compendious term of investment advisor when referring to these employees.

The Claims

224 The plaintiffs state that the brokerage firms, through their analysts, prepared reports and rendered opinions throughout the class periods relating to Bre-X. They contend that these reports were negligently prepared and that the members of the class relied upon the representations contained in the reports to purchase Bre-X stock, in consequence of which they suffered a loss. Against these seven brokerage houses and the individual analysts, the plaintiffs assert claims in negligence, fraudulent misrepresentation, negligent misrepresentation and breach of the *Competition Act*. The claims against the defendants in breach of contract and breach of fiduciary duty were abandoned by the plaintiffs in oral argument.

The Theory of the Plaintiffs

225 The plaintiffs' theory of liability in the brokers actions was somewhat fluid during the argument of the motion. When the various propositions advanced by the plaintiffs are analyzed, however, it is apparent that the alleged negligence of the individual analysts is the central theme. As counsel for the plaintiffs noted, the analysts are the "interface" between the Busang and the brokers. Thus, the plaintiffs' theories of liability may be reduced to two alternative submissions: a breach of a duty to warn and misrepresentation.

226 The plaintiffs contend that these theories are supported by the factual background. They submit that the brokers' knowledge of the Bre-X situation should be deemed to be the same as the analysts' knowledge. If, at a given point in time, the analysts should have been aware of the fraud, then so too should the brokers have been aware. From the point in time that the brokers should have been aware of the fraud, they had a duty to warn their clients, the prospective class members.

227 Alternatively, the plaintiffs state that even if there was no simple duty to warn, the brokers and their analysts had a duty not to make representations that were false or inaccurate after the date when they should have been aware of the fraud. Consequently, any statement made after the "should have known" date that suggests Bre-X shares have value on the basis of the gold resources in the Busang is negligently or fraudulently made.

Class Definition

228 The proposed classes in respect of Nesbitt Burns and First Marathon are subclasses in the Carom I action. The Nesbitt Burns subclass is described as:

> Persons in Canada who purchased shares of Bre-X Minerals Ltd. between August 17, 1995 and March 26, 1997 through Nesbitt Burns Inc. and suffered a net loss.

The First Marathon subclass and the other brokerage classes are described in like fashion with the exception of a variation in the start date for each class.

229 The exclusions from the subclasses and classes are the same as set above in the Carom I action.

A) Common Issues

230 The third element in the test for certification is that the claims of the class members raise common issues. I have set out above the law relating to the test for common issues. Briefly put, however, under s. 5(1)(c) of the *CPA*, the plaintiffs must establish that the causes of action asserted raise "common, though not necessarily identical" issues of fact or law. In the case of common issues of law, they must arise from "common, though not necessarily identical" facts. In the context of a class proceeding, common issues must be such as to advance the litigation, not merely as a matter of logic, but in a legally material way.

i) Negligence — "*Duty to Warn*"

231 A duty to warn flows from a duty of care in negligence cases. As stated by Huddart J. in *McGauley v. British Columbia* (1990), 44 B.C.L.R. (2d) 217 (B.C. S.C.) at 228:

> ... the test for proximity will be the same, whether negligent misstatement or a duty to warn is alleged. The first question in cases where only economic loss has been suffered will be "whence cometh the duty?"

232 Furthermore, a duty to warn does not arise merely because of the broker-client relationship. In *Reed v. McDermid St. Lawrence Ltd.* (1990), 52 B.C.L.R. (2d) 265 (B.C. C.A.) at 271, the court stated:

> The extent of the duty of broker to client beyond the bare duty of executing instructions and being honest is thus a question of fact in each case of what passes between broker and client. A duty to warn does not arise from the mere relationship of broker to client, but from the facts.

233 In essence, the existence of a duty to warn is dependent on the standard of care owed to a particular client. Accordingly, the specifics of the relationship between the broker and the client must be analyzed to determine whether a broker has a duty to warn a client. It is apparent from the record in these actions that those relationships are individual in nature. For example, it cannot be said that the same standard of care exists between TD Securities' and its Greenline clients, who merely obtain discounted trading services without any advice, as would exist between a broker and a client who relied on the broker to manage a discretionary trading account. Nor can it be said that the standard of care for a client who is interested only in speculating is the same as that for a client who relies upon the broker for advice on a long term investment.

234 Furthermore, the relationships between the clients and the brokers were through the investment advisors employed by the brokers. The allegations of the representative plaintiffs, as set out in the statements of claim, are illustrative of the variety of potential relationships that must be examined and the attendant standards of care which must be determined.

235 Adenat Corp. claims to have been advised both that Bre-X shares were a good sound investment and that there was an opportunity to achieve a return in short term trading because of the fluctuations in the shares. Hines alleges that he became a client of Levesque because the investment advisor that he dealt with at another firm commenced employment with Levesque. Hines claims to have sought advice regarding Bre-X from the investment advisor prior to his purchase. Parent also followed his investment advisor from another firm to Midland Walwyn. He sought advice regarding Bre-X from the investment advisor. D'Eathe became a client of Midland Walwyn through solicitation by an investment advisor. After D'Eathe became a client, the advisor contacted him and recommended the purchase of Bre-X stock. When Gardonio and her husband met with the CIBC Wood Gundy investment advisor, they informed the advisor that they were risk adverse. During 1995, Bre-X stock was discussed with Gardonio but she did not purchase because she felt it was too speculative. During 1996 the investment advisor recommended the purchase of Bre-X to Gardonio's

husband and he purchased 1,000 shares on her behalf for her RRSP. Freeman has been a client of a CIBC Wood Gundy representative for approximately 15 years. Throughout his relationship with CIBC Wood Gundy, he relied on the advice of the representative. In September, 1996 the representative advised Freeman that he should purchase Bre-X shares.

236 A representative plaintiff need not necessarily be typical of the class. However, such a plaintiff must be taken to be representative of the class members. Here, the factual allegations of the representative plaintiffs reveal the importance, as well as the individual nature, of the relationship between the investment advisor and the client. The standard of care owed by an investment advisor to a particular client is concordant with the services that the advisor undertook to provide to the client, that is, whether the client was to be provided advice as opposed to mere information or whether the advisor was given discretion to trade on behalf of the client.

237 Hines and Parent allege loyalty to particular investment advisors, as evidenced by their claims that they transferred accounts to different brokerages because their respective investment advisors changed employers. Adenat alleges that it was interested in solid stocks but also interested in making money on short term fluctuations. The second of its objectives could only be met if the Bre-X shares showed a certain volatility. In fact the trading records of Adenat produced on this motion show that the longest period that it held Bre-X stock was 10 days. Gardonio and Freeman, on the other hand, were risk adverse. For them, volatile stocks were an anathema. Freeman alleges long-term reliance on his investment advisor for advice regarding all his investments. Hines claims that he sought advice regarding Bre-X from his investment advisor, while D'Eathe claims that his investment advisor contacted him recommending Bre-X as a purchase. None of these representative plaintiffs had given their investment advisors discretionary authority over their accounts.

238 The standard of care varies widely among just these six plaintiffs. No determination of a standard of care in respect of one relationship between broker and client could be said to be determinative of the standard to be observed in the others. Adenat's investment advisor, if attempting to identify volatile stocks for trading, cannot be held to the same standard of care as Gardonio's advisor, who, recommended stocks, including Bre-X, while aware of her risk aversion and the RRSP nature of her investment capital.

239 Moreover, I cannot accept the plaintiffs' contention that the Bre-X fraud occasions a common standard of care on the part of the brokerage firms. In my view, giving effect to this proposition would be tantamount to placing every broker in a fiduciary relationship with each of its clients. Not only has the claim in breach of fiduciary duty been abandoned by the plaintiffs in the instant case but the notion that a broker-client relationship is inherently fiduciary has been soundly rejected in Canadian law. See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.); *R.H. Deacon & Co. v. Varga* (1972), [1973] 1 O.R. 233 (Ont. C.A.), aff'd (1973), [1975] 1 S.C.R. 39 (S.C.C.).

240 The standard of care between the brokers and their clients is individual in nature. It follows that the duty to warn is an individual issue as well and therefore no common issues arise from this claim.

ii) Fraudulent and Negligent Misrepresentation and Competition Act

241 The claims in fraudulent and negligent misrepresentation and for the breach of the *Competition Act* turn on the analysts research reports. The respective analyst defendants produced these reports in the following numbers: Bianchini (Nesbitt) 79 reports, Smith (First Marathon) 24 reports, Fowler (Levesque) 15 reports, Jalonen (Midland) 30 reports, Gillis (TD Securities) 21 reports, Reeve (ScotiaMcLeod) 27 reports, and Kaiser (CIBC Wood Gundy) 30 reports. The defendants contend that the volume of reports produced mean that there are multiple representations at issue. They state the causes of action alleged require individual analysis of the specific representation made to each plaintiff and, therefore, no common issues arise from any representations contained in any of the reports.

242 Conversely, the plaintiffs state that common issues arise on two bases. Firstly, they claim that the information in the various reports can be reduced to a single statement "that there is gold in mineable quantities in Busang". Thus, they state, the reduction of the multiple representations to a single statement raises common issues. Secondly, the plaintiffs contend that it is possible to determine that at a certain point in time each analyst should have become aware of the alleged

Bre-X fraud. By not discovering this alleged fraud, the analysts were either negligent or reckless. Consequently, every research report published by the analysts after the date when the fraud should have been discovered which attributed value to Bre-X on the basis of its gold resources constituted a misrepresentation which was either negligent, fraudulent or in breach of the *Competition Act*.

243 I have dealt with the contention that the multiple representation can be reduced to a single representation which raises common issues previously in these reasons. I do not propose to deal with it at length here, other than to say that I reject it for the same reasons as set out above in the Bre-X- Carom I action. However, I accept the plaintiffs' contention that common issues are raised on the basis that is arguable that a finding can be made at a common issue trial that there is a point in time at which the analysts were, or ought to have been, aware of the alleged fraud.

244 The plaintiffs stated in argument that the causes of action, and the common issues which they contend emanate therefrom, are based on the representations of the analysts. These representations are found in the form of the numerous analysts reports produced throughout the class period. The plaintiffs concede that if there is no culpable conduct on the part of the analysts, then there is no liability which enures to either the analysts or the brokers. Absent the representations in the reports, the analysts have no duty to the plaintiffs to ground a claim in negligent misrepresentation, nor would the essential element exist for the claims in fraudulent misrepresentation or for the breach of the *Competition Act*.

245 The plaintiffs must establish the existence of a special relationship (duty of care), an inaccurate statement that was negligently made, reasonable reliance on the statement, a detrimental effect from the reliance and damages as a result to succeed in a claim of negligent misrepresentation.

246 The plaintiffs concede that the latter three criteria, reliance, causation and damages are individual issues that will have to be resolved at individual trials. They contend however, that the existence of a duty of care and the negligent statement are common issues that can be determined through a single trial with representative plaintiffs.

247 The law with respect to duty of care is set out in these reasons relating to the SNC-Carom II action. In contrast to the SNC-Carom II action, the policy concerns of "liability in an indeterminate amount for an indeterminate time to an indeterminate class", such as to override a *prima facie* duty of care in negligent misrepresentation, are not compelling in the Brokers actions.

248 It is the evidence of the brokers that the analysts' research reports were distributed to their investment advisors, who in turn determine whether they should be disseminated to particular clients. They are not distributed to the world at large. The reports had a facial purpose of evaluating the share price of Bre-X stock. That evaluation was based on a number of factors, one of which was the gold resources in the Busang.

249 In my view, it could be established at a common issue trial that the research reports were "serious statements" produced with an intention to provide information to clients of the brokers for the purpose of assisting them with their investment decisions. Therefore, representative plaintiffs could establish at a common issue trial that the analysts had a duty of care to the plaintiff class.

250 Since, the duty of care of the analysts, if any, to the plaintiff class members arises from the statements made, the standard of care to each class member is not dependent on an ongoing individual relationship as exists between the investment advisors and the clients. Thus, the standard of care required of the analyst in making the statements, and any breach of that standard, in respect of the statements is a common issue.

251 The essence of misrepresentation is the negligent statement. If a point in time is fixed at which the analysts knew or ought to have known of the alleged fraud, then any statement to the contrary after that point is an inaccurate, negligently made statement. Such a finding would advance the litigation.

252 Success in a claim of fraudulent misrepresentation requires a false statement, intentionally or recklessly made, with an intent to deceive, reliance on the statement and damages as a result.

253 The plaintiffs contemplate that the issues of reliance and damages in respect of this cause of action will also be resolved at individual trials. They assert that the falsity of the statements in the analysts reports and the recklessness of the analysts in making the statements ought to be determined at a common issue trial. I agree. As stated above, a finding may be made at a common issue trial that the alleged recklessness occurred at a finite point in the sequence of reports produced by the analysts.

254 The plaintiffs propose that certain issues of fact and law are common in respect of the claim under the *Competition Act*. I have accepted this submission in the Bre-X-Carom I and SNC-Carom II action. I accept it here for the same reasons.

255 In the result, I find that there are common issues arising from the claims in negligent misrepresentation, fraudulent misrepresentation and for the breach of the *Competition Act*. I have framed these issues as follows:

1) Did the analysts reports concerning Bre-X give rise to a duty of care on the part of the analysts to clients to whom the reports were disseminated?

2) If yes, what was the standard of care owed by the analysts to the clients.

3) Did the analysts breach the requisite standard of care?

4) Were the analysts reckless in the reports they produced concerning Bre-X?

5) What is the meaning of the words "as a result of" in the *Competition Act*.

6) Does the *Negligence Act* or the concept of contributory negligence apply in assessing loss or damage under the *Competition Act*?

7) Was there a breach of s. 52 of the *Competition Act* by Bre-X and the Insiders giving rise to liability pursuant to section 36 if the class member can prove damages as a result of the representations?

B) Preferable Procedure

256 The fourth element in the test for certification is whether a class proceeding would be the preferable procedure for the resolution of the common issues. In these reasons in the Bre-X-Carom I action, I have set out the law relating to preferable procedure. Briefly put, neither the mere presence of individual issues, nor the fact that there will be individual proceedings required in order to reach a final determination, are sufficient in and of themselves to defeat a certification. The statute contemplates in s. 6 that individual issues will arise. Furthermore, in s. 11, the statute provides for a bifurcated process in class proceedings where individual issues will remain to be resolved after the common issue trial has been completed.

257 The proper approach to be taken in considering whether a class proceeding is the preferable procedure for resolving the common issues is to have regard to all of the individual and common issues arising from the claims in the context of the factual matrix. A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

258 As with the other criteria for certification there is an interaction between the common issues and the preferable procedure. In order for an issue to constitute a common issue in a class proceeding, the resolution of the issue must be capable of advancing the litigation in a legally material way. Thus in order for a common issue trial, and hence a class proceeding, to be the preferable procedure it must advance the litigation in such a way that the goals of the *Act* are met.

259 In these actions, I do not consider a class proceeding to be the preferable procedure for the resolution of the common issues. The plaintiffs are candid in conceding that each class member will have to participate in an individual trial in order to establish essential elements, reliance, causation and damages, of the causes of action pleaded. However, their contention that these individual issues can be determined in "mini-trials" is not borne out by the evidence. The elements of reliance, causation and quantum of damages are significant issues that will remain to be resolved following a common issue trial. The record on these motions shows that these individual issues will have to be decided from a complex factual matrix which is further complicated by the idiosyncratic nature of the relationship between each class member and the particular investment advisor. In consequence, the individual trials themselves will be complex, lengthy, individualistic inquiries which would be the polar opposite of the simplistic, abbreviated procedures envisioned by the plaintiffs.

260 The plaintiffs conceded in argument that each cause of action asserted on behalf of the class turns on the specific representations made to each individual class member. This concession is incorporated in the litigation plan proffered by the plaintiffs. It would be an involved undertaking to determine whether any particular representation contained in the analysts' reports was relied upon by a class member in consideration of the volume of representations, the transactional histories, the intervention of the investment advisor, the availability of information from other sources and other factors. In the context of the relationships in this action, it is a complex matter. Conversely, in my view, the determination of the common issues proposed by the plaintiffs will be relatively straightforward.

261 The plaintiffs' relationships with the brokers were through the investment advisors. These investment advisors were the plaintiffs' conduit for the analysts reports. Though there are allegations by several of the representative plaintiffs that they were party to conference calls conducted by analysts, this was the exception rather than a general practice. The investment advisor was responsible for determining, in light of the *client's specific needs*, whether an analyst's report, or the substance of the report, should be passed on to the client. Indeed, the plaintiffs acknowledge this in para. 124 of their factum which states in part:

> ... information was made available to the Nesbitt Burns registered representatives who were "*encouraged to consider the Research Department's opinions in the context of the particular client's situation, preferences and instructions*." (Emphasis in original).

262 Furthermore, the analyst's report, or the substance of the report, may have been passed on in whole, or in part, with or without modification by the investment advisor. In his affidavit filed on behalf of Nesbitt Burns, Michael McGrann states at para. 34(f):

> Investment Advisors are not restricted to securities covered by Nesbitt Burns' Research Department, nor are they required to adopt the Research Department's recommendations. Rather, they are encouraged to consider the Research Department's opinion in the context of the particular client's situation, preferences and instructions.

263 The investment advisor's impact on the actual representation transmitted to the client is discussed in the McGrann affidavit at paras. 34(g) and (h):

> 34(g) clients ask different questions about the nature of possible investments, and the responses of Investment Advisors to these questions will vary depending on the Investment Advisor, the client, the security under consideration, and a number of other circumstances;
>
> 34(h) the exact words used by each Investment Advisor to provide an explanation of the risk associated with a particular investment will vary, and the discussion about risk will depend on each client's knowledge and experience;

264 The investment advisor intermediary between the analysts' reports and the class members has the effect of adding to the complexity of the trial of the individual issues. Reliance is not established by a mere showing that a plaintiff was a recipient of a representation. Rather the representation must have caused the recipient to act in a certain manner. In

these actions, this means that not only will the details of the actual representations made to the individual class members have to be analyzed, but that the actions taken by the class member after each representation was made will have to be scrutinized as well. It is apparent that the inquiry into the issue of reliance on the analysts' reports will involve a detailed examination of the actual representations made to the class member, how the representations were transmitted, whether orally or in written form, in summary excerpts or in whole, and whether the representations were the actual words used in the analysts' reports or whether they were paraphrased by the investment advisor.

265 In addition, the record of the class member's trading activity prior to and after the alleged misrepresentation or misrepresentations were made will be subjected to scrutiny. The threshold for inclusion in the class is set at "net loss" in the trading of Bre-X shares. Accordingly, each trade will have to be examined and the operative representations determined at the point in time that the decision to trade in the Bre-X shares was made. There will be an issue as to whether the class member was made aware of the disclaimer included in the report and if so, what impact the disclaimer should have in the circumstances regarding the particular individual. The testimonial evidence that will be adduced by both plaintiffs and defendants will undoubtedly raise credibility issues that will have to be determined in every individual action.

266 Moreover, causation is another issue conceded by the plaintiffs to be individual. This issue will be likewise time-consuming. For example, Gibeault, in his affidavit on behalf of the defendant broker Levesque and its analyst Fowler, states that the research reports produced by Fowler contained the following recommendations:

Recommendation	Date
Speculative Buy	January 23, 1996
Buy	September 6, 1996
Speculative Buy	November 27, 1996
Hold / Maintain	December 2, 1996
Speculative Buy	January 16, 1997
Sell	February 18, 1997
Buy	February 28, 1997
Speculative Buy	March 24, 1997
Sell	March 27, 1997
Recommendations Suspended	March 31, 1997

267 In addition, Gibeault states:

> ... of the retail clients [of Levesque] who sold during the proposed class period (4,781 trades in total), only 1353 of those trades, approximately 28%, were executed during periods when the Levesque research department was recommending to "sell".

268 Each analyst defendant produced somewhere between 15 and 79 research reports, over periods ranging from 12 to 21 months, containing a spectrum of recommendations. The class members may have had access to reports from more than one broker. The research reports were not the only source of information about Bre-X available to investors. The plaintiffs in the Bre-X-Carom I action ground their claim on some 160 press releases issued by Bre-X from May, 1993 to March, 1997. Four newspapers, the Toronto Star, the Globe and Mail, the Financial Post and the Northern Miner, published a combined 1998 articles relating to Bre-X between May 1, 1993 and May 7, 1997. Information relating to Bre-X from a number of other sources was bountiful during the class period. I make no comment on the impact that these considerations may have on the merits of the actions, other than to say that they further illustrate that the determination of the issues of reliance, causation and damages are not mere formalities which can be made in an abbreviated trial process.

269 The goals of the *CPA* will not be met through constituting these actions as class proceedings. Indeed, a certification may well have the effect of detracting from the goal of access to justice because the plaintiffs have framed the actions narrowly in order to raise common issues. They have not pursued claims against individual investment advisors. They

have abandoned the claims in breach of contract and breach of fiduciary duty. The abandonment of causes of action by the representative plaintiffs in a class proceeding raises questions as to whether any class member who does not opt out of the class proceeding is deemed to have personally abandoned those claims as well. No submissions were made on this point, nor is it necessary to decide — a determination of the issue either way raises concern.

270 If the class members are deemed to have abandoned the claims by participation in the class proceeding, then their participation may well have forced them to abandon, to their prejudice, meritorious individual claims. If they are not deemed to have abandoned the personal claims, then the class members face the prospect of two court proceedings in order to have all of their claims adjudicated. The latter would compromise both access to justice and judicial economy.

271 As I have noted in these reasons, the *Report of Attorney General's Advisory Committee on Class Action Reform* states at 32:

> The Committee ... selected the word "preferable" over other words such as "reasonable" or "superior", as it was thought that the word "preferable" would best draw the court into a consideration of whether or not the class proceeding was a *fair, efficient and manageable method of advancing the claim*. The class proceeding should also be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on. (Emphasis added.)

272 The heart of the brokers actions is the determination of the individual issues of reliance, causation and damages. This is not to diminish the importance of the proposed common issues relating to the analysts reports. But proportionately, a determination of those issues as a part of individual trials will not be unduly complex or time consuming. It will occupy a small portion of the trial in the totality of the issues relating to reliance, causation and damages. In my view, a test case centered on the analysts reports produced by each brokerage firm provides a simple answer to effectively streamlining that aspect of the individual trials. However, even absent this approach, as I have stated, if the issues concerning the analysts' reports must be decided in each individual trial, its impact will not be unduly burdensome on either the plaintiff or the court resources.

273 Significantly, in respect of the goal of judicial economy, a class proceeding, as proposed by the plaintiffs in the brokerage actions, would devolve into a multitude of individual trials on a national scale under the management of this court. The plaintiff proffers no litigation plan dealing with this matter which enlightens the court as to the feasibility of an undertaking of this magnitude. Judicial experience under Rule 37 of the *Rules of Civil Procedure*, and otherwise, demonstrates that case management responsibilities of this nature in complex litigation tax the judicial system to the limit.

274 Further, the prospects of achieving either of the concomitant goals of access to justice or the modification of the behaviour of wrongdoers in this proposed class proceeding are remote. Therefore, the lack of judicial economy cannot be overlooked in favour of other policy considerations. The plaintiffs, even after any findings are made at a common issue trial, face lengthy, expensive trials in order to complete the actions. There is a question as to whether potentially viable individual actions will have to be abandoned by the plaintiffs in order to participate in the class proceeding. In the circumstances, certification as a class proceeding would detract from, rather than enhance access to justice. Moreover, access to justice and behavioural modification are inter-related. Where a class proceeding does not advance the goal of access to justice, the realization of any meaningful behavioural modification is reduced, if not eliminated.

275 Applying the considerations enunciated in *Bywater*, a class proceeding would not be the preferable procedure for resolving the common issues. Simply put, the end of the common issue trial will be but the beginning of the litigation. The significant individual trials which would remain after the relatively straightforward common issue trial would not decrease, in any measurable degree, the burden on judicial resources. Neither access to justice for the plaintiffs, nor the behavioural modification of the defendants will be achieved through the class proceeding.

C) Representative Plaintiffs

276 The final requirement for certification is the existence of a representative plaintiff who meets the criteria of s. 5(1)(e). Had I found that the brokerage actions met the first four requirements of s. 5(1), I would nevertheless have concluded that the proposed representative plaintiffs are unacceptable. The representative plaintiffs proposed for Nesbitt Burns and First Marathon subclasses do not meet the requirements of s. 5(2) of the Act. Furthermore, none of the representative plaintiffs, including those in the Nesbitt Burns and First Marathon subclasses, have produced a "plan for the proceeding that sets out a workable method of the advancing the proceeding on behalf of the class" as required under s. 5(1)(e)(ii) of the Act.

277 Section 5(2) of the *CPA* provides:

> 5(2) ... where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or a defendant who,
>
> (a) would fairly and adequately represent the interests of the subclass;
>
> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
>
> (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

278 Subclasses have been proposed in the Carom I action in respect of the claims against Nesbitt Burns and First Marathon. The representative plaintiffs proposed for these subclasses, 662 Ontario and Shimizu for Nesbitt Burns and Schonberger for First Marathon, are also proposed representative plaintiffs in the main Bre-X-Carom I action. This dual status leaves each of them in a position where they have potential conflicts in interest with the other subclass members on the common issues. The conflicts arise from the causes of action pleaded. In the main action, the plaintiffs have claimed in conspiracy against the Bre-X defendants. There are no allegations of conspiracy against Nesbitt Burns or First Marathon. However, proof of the conspiracy claim against the Bre-X defendants in the main action may well serve as a defence to the claims against Nesbitt Burns and First Marathon. Where the success of a claim of one class may serve as a defence to the claims of another class or a subclass, the representative plaintiffs advancing the separate claims cannot help but have a conflict on the common issues.

279 Accordingly, the proposed representative plaintiffs for the Nesbitt Burns and First Marathon subclasses are unacceptable.

280 Notwithstanding the conflicts in interest with respect to the Nesbitt Burns and First Marathon subclass representative plaintiffs, neither they nor the proposed representative plaintiffs in the other Brokers actions have met the requirements of producing a workable plan. The plaintiffs have produced one plan for all seven actions. The scope and complexity of the litigation in the Brokers actions requires a more detailed plan.

Disposition

The Bre-X-Carom I Action

281 I have found that the claims pleaded in conspiracy, fraudulent misrepresentation and breach of the *Competition Act* raise common issues as against Bre-X, Bresea and the named individual defendants who were directors, officers or employees of Bre-X. Further, subject to the plaintiffs providing a satisfactory litigation plan, I find that a class proceeding would be the preferable procedure for the resolution of those issues. The representative plaintiffs are approved. Upon the plaintiffs providing a litigation plan which is acceptable to the court an order will go accordingly.

282 I have not found any common issues resulting from the claim in negligent misrepresentation. Nor would I consider a class proceeding to be the preferable procedure even if I had found that there were common issues. In the result, the motion for certification as a class proceeding for the claim of negligent misrepresentation is dismissed.

283 The motions for certification as class proceedings against Nesbitt Burns, First Marathon and their respective analysts, are dismissed for the reasons set out below in the Brokers actions.

SNC-Carom II Action

284 I have not found that there are any common issues which arise from the claims as pleaded against the defendants in this action. Even if I had so found, I would not have considered a class proceeding to be the preferable procedure for their resolution. The motion for certification as a class proceeding is dismissed.

Brokers Actions

285 I have found that the claims pleaded against the brokers and analysts, including Nesbitt Burns, First Marathon and their respective analysts, in negligent misrepresentation, fraudulent misrepresentation and breach of the *Competition Act* raise common issues. However, I do not consider a class proceeding to be the preferable procedure for their resolution. I have not found any common issues to exist in the claim of negligence. Had I so found, I would not consider a class proceeding to be the preferable procedure for their resolution. The motions for certification as class proceedings are dismissed.

286 Counsel may re-attend by appointment in respect of any outstanding matters arising out of these reasons. Iam obliged to counsel for the thoroughness of their preparation and submissions and for their courtesy throughout these extensive proceedings.

Motion granted in part.

2010 SKQB 98
Saskatchewan Court of Queen's Bench

Robinson v. Saskatoon (City)

2010 CarswellSask 189, 2010 SKQB 98, [2010] 10 W.W.R. 84,
186 A.C.W.S. (3d) 609, 353 Sask. R. 25, 70 M.P.L.R. (4th) 300

James Robinson, Mervin N Sawchyn and Garth Collicutt (Plaintiffs) and The City of Saskatoon (Defendants) and United Cabs Limited, Garth Swan, Keith Swan, Scott Suppes, Laurie Suppes, Cliff Kowbel, James Frie, John Schnurr, Glenn Drews, Tony Rosina, Wayne Soroka (Defendants) and C.S.T. Holdings Ltd., Dacts Investments Ltd., Phyllis Schlosser Investments Ltd., JG Taxis Ltd., D & G Wehage Holdings Ltd., Frie Taxis Ltd., GTC Taxis Ltd., Gordon W Sealey, Mae F Sealey, George Edmund Sparrow, Janet L Hitchings, Stephen Roy Petrovich, Arthur Frie, La Verne P Tessmer, John E Olsen, Peter Bacala, Norma Mckay, Albert H Tessmer, Paul S Veretonik, Albert T Pyra, Michael J Bouclin, David C Thomas, Wilbert L Stern, Jacob D Berg, James D Danners, Patricia L Drews, Fadia Mohamad Ghazi, Elisabeta Maria Lutas, Chaudhry Naseer and Malik Harron (Defendants)

G.M. Currie J.

Judgment: March 9, 2010
Docket: Saskatoon Q.B.G. 571/08

Counsel: Larry B. Ayers for Plaintiffs
Shaunt Parthev, Vanessa Monar Enweani for Defendant, City of Saskatoon
Jay D. Watson for Defendants, Phyllis Schlosser Investments Ltd., JG Taxis Ltd.
Richard W. Danyliuk, Q.C., for Other Defendants

***G.M. Currie J.*:**

1 The plaintiffs apply for certification under *The Class Actions Act*, S.S. 2001, c. C-12.01. They propose a class comprised of some past and current taxicab owners and drivers in Saskatoon.

2 The defendants fall into two categories. In the first category is the City of Saskatoon (the "City"). The plaintiffs allege that the City is liable to the class in negligence by virtue of the City having interpreted and administered its licensing bylaw, in relation to the administration of the taxicab industry in Saskatoon, contrary to the provisions of the bylaw.

3 In the second category are the other defendants, to whom I will refer as "the industry defendants". The plaintiffs allege that the industry defendants are liable to the class for unlawful interference with trade or business, and in unjust enrichment. These allegations arise from the plaintiffs' assertion that the industry defendants have obtained and used taxicab licences contrary to the bylaw.

4 The City regulates and administers the taxicab industry in Saskatoon through its *License Bylaw*, Bylaw No. 6066. In their statement of claim the plaintiffs assert that, at all material times, the bylaw and its predecessors have included the provision that "A license shall be taken out by every person who owns or keeps for hire or profit a taxicab or taxicabs ...." The plaintiffs further assert that, at some material times, the bylaw's predecessors have included the provision that "Taxicab licences shall not be transferrable."

5 The plaintiffs assert that for over forty years the City has accommodated the transfer of licences from one licence holder to another, and that some of the transferees do not actually own or keep a taxicab. The plaintiffs further assert that the City's doing so has been contrary to the provisions of the bylaw, because the proper interpretation of the bylaw is that only those persons who actually own or drive taxicabs may hold taxicab licences. In short, the plaintiffs assert that the City has negligently interpreted and negligently administered the bylaw.

6 The plaintiffs claim that the persons who actually own or drive taxicabs in Saskatoon have been deprived of the benefit of obtaining taxicab licences themselves. They have been deprived of this benefit as a consequence of the way in which taxicab licences have been administered by the City and as a consequence of the conduct of the industry defendants in transferring and leasing licences. The plaintiffs say that this deprivation has resulted in taxicab owners and drivers being out of pocket for the lease payments that they have made to the licence holders. The plaintiffs say further that the licence holders and other industry defendants improperly profited from holding the licences.

7 The plaintiffs ask certification of this action as a class action on behalf of a class encompassing those taxicab owners or drivers who paid fees to lease taxicab licences in Saskatoon.

Criteria to be met for certification

8 To obtain certification, the plaintiffs must establish all of the five criteria set out at s. 6(1) of *The Class Actions Act*:

> **6**(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;
>
> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

Cause of action against the City: negligence

9 In *Hoffman v. Monsanto Canada Inc.*, 2007 SKCA 47, [2007] 6 W.W.R. 387 (Sask. C.A.), Mr. Justice Cameron addressed the proper approach to determining whether the pleadings disclose a cause of action for the purpose of s. 6(1)(a). He said at paras. 45 and 50:

> 45 Section 6 is essentially a screening mechanism, the purpose of which is to allow an action to proceed as a class action provided it is suitable for class action treatment. So far as the section extends to screening the *cause of action*, as contemplated by paragraph (a), it may be taken to be aimed at allowing an action to proceed as a class action provided the applicant for certification satisfies the judge that the class has what appears to be an *authentic* cause or causes of action. This is consistent with the purposes of the *Act*, which lie in improved access to justice, litigation

efficiency, and modification of behaviour by wrongdoers. None of these purposes is served by allowing an action to proceed as a class action unless the class appears to have a genuine cause or causes of action. Indeed, the purposes are otherwise undermined.

. . . . .

50 Understood in this light, we are of the opinion Justice Smith correctly identified the essential nature of the matter when she said that, assuming the facts as pleaded are true, the representative plaintiffs must persuade the court that there exists a plausible basis for supposing the defendants could be liable to the claims of the class. This is a way of saying, simply and effectively, that the representative plaintiff has to satisfy the judge that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies....

[Emphasis in original.]

10 The claim against the City is in negligence. The plaintiffs say that the City has been administering the bylaw in a manner that is contrary to the correct interpretation of the bylaw. In so doing, say the plaintiffs, the City has breached a duty of care that it owed to the class. The plaintiffs do not attack the bylaw itself. Rather, the claim against the City is based on the allegation that the City is liable in negligence for acting outside of the bylaw.

11 In so alleging, the plaintiffs face decisions of the Supreme Court of Canada establishing that the incorrect interpretation or administration of a bylaw or statute by a public authority does not give rise to a cause of action in negligence. Among those decisions is *Entreprises Sibeca inc. c. Frelighsburg (Municipalité)*, [2004] 3 S.C.R. 304, 2004 SCC 61 (S.C.C.), in which Madam Justice Deschamps said at paras. 23-24:

[23] In public law, a municipality may not therefore be held liable for the exercise of its regulatory power if it acts in good faith or if the exercise of this power cannot be characterized as irrational. The declaration on judicial review that a by-law is invalid because it is founded on a misinterpretation of the law or on a consideration determined to be irrelevant does not necessarily expose the municipality to extra-contractual liability. A municipality has a margin of legitimate error. In public law, it is protected by what may be called relative immunity. Does that immunity prevail over the civil law rules?

[24] To answer that question, I would refer to what Laskin J. said in *Welbridge*, [[1971] S.C.R. 957], which, in my view, transcends the common law. Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law....

12 In *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, [2008] 2 S.C.R. 551, 2008 SCC 42 (S.C.C.), the Supreme Court again applied this approach. At paras. 7-9, Chief Justice McLachlin addressed a negligence claim that was framed in the pleadings in the same way as the plaintiffs have framed their negligence claim against the City:

[7] The Court of Appeal read the appellant's negligence claim as a claim for negligently acting outside the law (paras. 18-21). With one exception, discussed more fully later, I agree with this characterization of the negligence claim. For purposes of these reasons, I would characterize the imputed fault as breach of statutory duty. The statement of claim, read generously as required in an application to strike, focused mainly on two alleged acts of negligence: requiring the game farmers to enter into the broad indemnification agreement, and down-grading the status of those who refused to do so. In both cases, the alleged fault may be described as failing to act in accordance with the authorizing acts and regulations. As the statement of claim puts it at para. 58, the government and its employees

"were under a duty of care to the Class [game farmers] to ensure those Acts and Regulations were administered in accordance with law and not to operate in breach of them".

[8] I agree with the Court of Appeal that the claim, thus characterized, discloses no cause of action recognized by law and must be struck. The Court of Appeal correctly concluded that the viability of the action in negligence falls to be determined by application of *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), adopted and refined by this Court in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79. The Court of Appeal concluded that to date the law has not recognized an action against a government authority for negligent breach of statutory duty by acting outside or contrary to the law. This being the case, the question was whether a new instance of negligence should be permitted. This question is resolved by asking whether a new kind of duty of care arises under the two-step *Anns* inquiry. The Court of Appeal did not find it necessary to consider the first branch of *Anns*, holding that even if the requirement of proximity were established, residual policy considerations at the second step militate against recognizing such a cause of action.

[9] In my view, the Court of Appeal was correct in these conclusions. The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant pursued this remedy before Gerein C.J.Q.B. and obtained a declaration that the government's action of reducing the herd certification status was unlawful and invalid. No parallel action lies in tort.

13 Thus the law does not recognize a cause of action against a public authority for what may be characterized as negligently acting outside of the law or negligently breaching a statutory duty, which is the nature of the plaintiffs' claim against the City in this action. In *Holland* (SCC) at para. 10, the Supreme Court further rejected the suggestion that "a hitherto unrecognized relationship of potential liability in negligence should be recognized under the *Anns* test", adopting the reasoning of Mr. Justice Richards in *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, 2007 SKCA 18, [2007] 7 W.W.R. 17 (Sask. C.A.) at para. 39-43:

39 Canadian common law has avoided extending tort doctrine so as to create a claim for damages for the mere breach of a statutory provision. Thus, in *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, the Supreme Court refused to recognize a nominate tort of statutory breach giving a right to compensation merely on proof of breach and, at the same time, refused to accept that an unexcused statutory breach constitutes negligence *per se* giving rise to absolute liaiblity. Rather, the Court said proof of statutory breach should be seen at most as evidence of negligence and the statutory prescription of a duty might serve as a useful standard for reasonable conduct.

40 Against the background of this reluctance to create private law consequences for simple failures to act in accordance with legislative requirements, the respondent in this case seeks to advance a claim which effectively would create a regime of absolute liability for public authorities acting outside their lawful mandates. He asks the Court to open the door to liability based on nothing more than the fact of *ultra vires* action itself.

41 The practical effect of this approach is readily apparent. The respondent's claim, if recognized in law, would put regulators and other public authorities in the position where, notwithstanding both careful efforts to determine the limits of their authority and earnest attempts to operate within those limits, they would nonetheless be exposed to private law liability if a court subsequently took a different view of the scope of their powers. At the extreme, an authority could proceed in reliance on a precedent set by a court of appeal to the effect its actions were lawful but, if the Supreme Court ultimately decided otherwise, the public authority would be liable for damages.

42 Two related consequences of this sort of legal regime are especially important here. First of all, the principle advanced by the respondent could be expected to generate an undesirable chilling effect. Regulators, and by extension government authorities more generally, might very well be reluctant to pursue the public interest for fear that, at some later time, a court might fix them with liability because they misjudge the scope of their authority.

> Second, endorsing the theory of the respondent's claim would expose public authorities to unpredictable and possibly massive liabilities. As the Supreme Court recognized in *Cooper v. Hobart*, *supra*, at para. 53, such a "spectre of indeterminate liability" is a policy consideration of some significance which weighs against giving effect to an alleged duty of care.
>
> 43 More generally of course, the respondent's theory of liability would fundamentally shift the way in which the public and private spheres historically have carried the consequences or burden of governmental action which is shown to be *ultra vires*. I see no policy reason which would warrant such a dramatic revision in the shape of the law and, as indicated above, see much which cuts tellingly against shaping the law in the manner sought by the respondent.

14 This reasoning applies equally to the plaintiffs' negligence claim in this action, which is framed in the same manner as was the claim in *Holland*.

15 The plaintiffs suggest, though, that the City's administration of the bylaw falls into the category of "operational" decisions, rather than of "policy" decisions. The significance of this suggestion is that the Supreme Court has recognized that the manner in which a public authority implements an operational decision can give rise to liability in negligence. Chief Justice McLachlin referred to this distinction at para. 14 of *Holland* (SCC), citing *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), and other decisions of the Supreme Court:

> 14 ... Policy decisions about what acts to perform under a statute do not give rise to liability in negligence. On the other hand, once a decision to act has been made, the government may be liable in negligence for the manner in which it *implements* that decision ....
>
> [Emphasis in original.]

16 In the matter before me, the decisions of the City that are attacked by the plaintiffs are policy decisions, not operational decisions. In their statement of claim, the plaintiffs have identified decisions made by the City, based on the City's interpretation of the bylaw, as to the general approach to be used by the City in administering the bylaw in relation to licence transfers and in relation to licence holdings. Those are broad decisions of general application to all occasions of licence transfer and licence holding. Such decisions fall into the category of discretionary decisions that, I conclude, the Supreme Court does not contemplate will give rise to a cause of action in negligence.

17 The plaintiffs' quarrel is not with the implementation of those broad decisions in any particular case. Such implementation may involve operational decisions. Rather, the plaintiffs' quarrel is with the City's broad decisions to accommodate licence transfers and to permit licences to be held by persons who do not actually own or drive taxicabs. Those are policy decisions.

18 In summary, the plaintiffs plead that the City has wrongly interpreted and administered its bylaw, and that consequently the City is liable to the class in negligence. Assuming the accuracy of the facts set out in the plaintiffs' pleadings, though, there is no plausible basis for supposing that the City could be held liable in negligence. A cause of action does not arise from the facts pleaded by the plaintiffs. The plaintiffs have not established that the class has an apparently authentic or genuine cause of action.

19 Accordingly, as the requirement in s. 6(1)(a) of the Act has not been met, the action will not be certified with respect to the defendant City.

Cause of action against the industry defendants: intentional interference

20 The plaintiffs allege two causes of action against the industry defendants. The first of these is intentional interference with the trade or business of the class. The parties have treated the plaintiffs' pleading in this regard as a pleading of unlawful interference with economic relations.

21 The elements of unlawful interference with economic relations, adopted by Mr. Justice Barclay in *Custom Cycle (1996) Ltd. v. Honda Canada Inc.*, 2009 SKQB 427, [2009] S.J. No. 631 (Sask. Q.B.), were set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 O.R. (3d) 229 (Ont. Gen. Div.) at page 244:

> In my view, and I so find, there is a tort in the Canadian common law which I shall call the "tort of unlawful interference with economic relations". The elements of the tort of "unlawful interference with economic relations" are: (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party; (2) knowledge by the defendant of that business relationship or expectancy; (3) intentional interference which induces or causes a termination of the business relationship or expectancy; (4) the interference is by way of unlawful means; (5) the interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and (6) there is a resultant loss to the plaintiff.

22 To establish that they have an apparently authentic or genuine cause of action in unlawful interference with economic relations, the plaintiffs must plead facts that provide a plausible basis for supposing that the six elements of the tort could be proven at trial.

23 As to the first element, the plaintiffs have not pleaded facts suggesting the existence of a valid business relationship or business expectancy between any proposed class member and another party. In the statement of claim, they have made numerous references to the industry defendants having engaged in activities unlawfully, under false pretences, and by misrepresentations to persons other than members of the proposed class. Those activities include the transfer of taxicab licences and the obtaining of licences and registrations from the City and from Saskatchewan Government Insurance. Those activities include, as well, the leasing of taxicab licences to taxicab owners and drivers.

24 None of those pleaded facts, however, suggests a business relationship or expectancy that existed and then was interfered with by the industry defendants. The plaintiffs' complaint is that the holding, transferring and leasing of taxicab licences by the industry defendants has deprived the proposed class members of the opportunity to obtain taxicab licences themselves, and has resulted in the class members having to pay to lease the licences. Those complaints do not fall within the realm of the tort of unlawful interference with economic relations. That tort is committed only if a relationship or expectancy existed before the interference occurred, so that the interference had the effect of terminating the relationship or expectancy.

25 Because the plaintiffs' complaint is based on a different kind of situation, they have not pleaded a business relationship or expectancy that existed and then was interfered with by the industry defendants. That being the case, the plaintiffs also have not pleaded facts suggesting the second, third, fourth or fifth elements of the tort. The plaintiffs have identified loss, the sixth element.

26 So it is that, assuming the accuracy of the facts set out in the plaintiffs' pleadings, there is no plausible basis for supposing that the industry defendants could be held liable in unlawful interference with economic relations. That cause of action does not arise from the facts pleaded by the plaintiffs. The plaintiffs have not established that the class has an apparently authentic or genuine cause of action based on that tort.

27 Accordingly, as the requirement in s. 6(1)(a) of the Act has not been met, the action will not be certified with respect to unlawful interference with economic relations against the industry defendants.

Cause of action against the industry defendants: unjust enrichment

28 The second cause of action alleged by the plaintiffs against the industry defendants is unjust enrichment. The plaintiffs' pleading of unjust enrichment is at para. 7.7 of the amended statement of claim:

> 7.7 The plaintiff and class further claim against the defendant licensees and United Cabs for unjust enrichment, as the defendants were thereby unjustly enriched, at the expense of the plaintiffs and class without any juristic reason therefore [*sic*].

29 The elements of unjust enrichment are well established. They are set out, for example, in para. 30 of *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25 (S.C.C.):

> 30 ... The cause of action has three elements: (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) an absence of juristic reason for the enrichment ....

30 The plaintiffs' pleading that the industry defendants "were thereby unjustly enriched" follows para. 7.6 of the amended statement of claim. The reference to "thereby" in para. 7.7 may reasonably be understood to refer to something in para. 7.6. Para. 7.6 identifies activity of the industry defendants that includes obtaining taxicab licences, collecting lease fees for the use of taxicab licences, and engaging in the trade and sale of taxicab licences. Thus the plaintiffs may reasonably be understood in para. 7.7 to plead that the industry defendants were enriched by collecting lease fees and engaging in the trade and sale of taxicab licences.

31 As to the second element of unjust enrichment, in para. 7.7 the plaintiffs plead that the industry defendants' enrichment was "at the expense of the plaintiffs". The industry defendants observe, correctly, that simply paraphrasing the element does not constitute pleading facts to suggest that a corresponding deprivation could be proven at trial.

32 The plaintiffs have pleaded facts suggesting that members of the proposed class suffered a deprivation corresponding with the enrichment of the industry defendants. Against the background of having identified the enrichment as arising from the collection of lease fees and engaging in the trade and sale of taxicab licences, the plaintiffs have pleaded the following in the amended statement of claim:

> 18. Since 1970 the plaintiff and the class have had to pay lease fees to the unlawful licensees for the use of the licenses at rates that are many times higher than the cost that the City charged the unlawful licensees or by law could have charged the licensees. These fees were set by and collected by the defendant United Cabs. These fees constitute damages claimed by the plaintiff and the class.

33 Thus the plaintiffs have tied the payment of lease fees by members of the proposed class to the enrichment of the industry defendants through receiving such fees. In para. 23 the plaintiffs provide a calculation of the excess fees paid by the plaintiff James Robinson, and in paras. 24 and 28 the plaintiffs plead that the claim of the proposed class relates to the lease fees. The plaintiffs have pleaded facts that suggest the corresponding deprivation required by the second element of unjust enrichment.

34 The third element of unjust enrichment is a lack of juristic reason for the enrichment. In para. 7.7 the plaintiffs have not identified the basis for their alleging a lack of juristic reason for the enrichment but, in the context of the statement of claim overall, it is clear that the allegation is tied to the plaintiffs' assertion that only actual taxicab owners and drivers are entitled to hold taxicab licences. The plaintiffs' position is that, since the industry defendants were not actual taxicab owners and drivers, the industry defendants did not have a juristic reason for receiving the lease payments, and thus to become enriched.

35 A juristic reason for the industry defendants receiving the lease payments is evident from the statement of claim, though. In the statement of claim, the plaintiffs describe the arrangement by which members of the proposed class have made lease payments to industry defendants to obtain the right to operate taxicabs under taxicab licences. The plaintiffs thus describe contracts. A contract constitutes a juristic reason for enrichment: *Garland*, para. 44.

36 The plaintiffs assert, though, that those contracts were imposed upon the members of the proposed class by false pretenses, so that the contracts are unlawful and therefore cannot provide a juristic reason. The assertion of false

pretences is based on the plaintiffs' interpretation of the bylaw, that only actual owners and drivers may hold licences, which leads to the larger challenge facing the plaintiffs on this topic.

37 Recalling the above discussion of the negligence claim against the City, I am driven to find that a plausible basis does not exist for concluding that the plaintiffs can establish at trial that the industry defendants did not have a juristic reason for receiving the lease payments. The statement of claim establishes that the conduct of the industry defendants, in obtaining and dealing with licences, was in compliance with the direction and requirements of the City, which was the public authority empowered to give such direction and to establish such requirements. As was the case in *Garland* (para. 58), the industry defendants in these circumstances were entitled to presume the legal propriety of the City's administration of the bylaw. They were entitled to rely on the City's administration in conducting their own business. There has been no determination by a court, as there was in *Hoffman* and in *Garland*, that the administration being carried out by the public authority was unlawful.

38 In *Garland* the defendant's entitlement to rely on the direction from the public authority ended when the plaintiff commenced court action, thereby giving notice to the defendant of the prospect of a serious concern about the public authority's direction. In particular, in the court action the plaintiff alleged that the defendant's charging of late payment penalties, as authorized by the Ontario Energy Board, contravened the "criminal interest rate" provision of the *Criminal Code of Canada*. Ultimately, the Supreme Court of Canada ruled that the penalties did contravene that provision of the *Criminal Code*.

39 In *Garland* the Supreme Court determined that the defendant reasonably could rely on the Ontario Energy Board's direction to charge the penalties, but only until the defendant received notice of the court action. Mr. Justice Iacobucci said at para. 59:

> 59 However, in 1994 when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit....

40 Justice Iacobucci concluded that the direction of the public authority, the Ontario Energy Board, no longer provided a juristic reason for receipt of the penalties by the defendant, Consumers' Gas, once the action had been commenced.

41 The statement of claim in the matter before me indicates that Mr. Robinson and others engaged in public discussion of their interpretation of the bylaw many years ago. Those discussions may be found to have come to the attention of the industry defendants, who nonetheless continued to rely on the City's administration of the bylaw.

42 The circumstances in *Garland* differ significantly from the circumstances in the action before me, though. The commencement of the court action in *Garland* drew the attention of Consumers' Gas to the existence of a serious possibility of there being a *Criminal Code* violation in connection with the penalties. On receiving the statement of claim, Consumers' Gas ought to have perceived that the allegation of a violation was sufficiently well-founded that it may well be established. The statement of claim would have identified the *Criminal Code* limit on interest charges and would have identified the interest rates equivalent to the penalties being charged by Consumers' Gas pursuant to the direction of the Ontario Energy Board. Indeed, Consumers' Gas did perceive a serious possibility that the allegation was well-founded, as its decision to continue charging the penalties was not borne of confidence that the allegation was wrong, but rather was a "gamble" (para. 59). In short, there was substance to the allegation.

43 In contrast, in this matter Mr. Robinson's interpretation of the bylaw, and the entitlement to damages of those who paid to lease licences, is not as straightforward. For example the plaintiffs assert that, since only actual taxicab owners and drivers may hold licences, those persons who have been owners and drivers all along are the ones who should have had the licences all along, so that they would not have had to pay to lease the licences. This assertion presumes that, in the absence of the industry defendants having obtained licences as they did, it would have been the proposed class members who would have obtained those licences.

44 That presumption is based on the historical fact that the proposed class members have been and are taxicab owners and drivers. That has been the case, though, only because they leased licences from the industry defendants. If the hands of time are turned back, and if the industry defendants do not hold taxicab licences, there is no particular reason to think that the proposed class members would have been the persons who ended up with the licences. One as readily can see that other persons would have acquired the licences and operated taxicabs.

45 The likelihood of Mr. Robinson's interpretation of the bylaw being the correct interpretation reasonably would have appeared diminished to the industry defendants, too, by the knowledge that all participants — the City, Saskatchewan Government Insurance, taxicab companies, licence holders, taxicab owners and taxicab drivers — had been conducting themselves in accordance with the City's interpretation of the bylaw since before 1970.

46 Further, the violation alleged in the *Garland* statement of claim was the commission of a criminal offence, through breach of s. 347 of the *Criminal Code*. The seriousness of the alleged violation was significant to Justice Iacobucci, as he discussed at para. 57:

> 57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of their crime ....

47 The allegations against the industry defendants in this action, as set out in the statement of claim, are not of a breach of the *Criminal Code*. The allegations are of civil wrongs: unlawful interference with economic relations, and unjust enrichment.

48 In *Garland* the assertion of criminal wrong ended the reasonable reliance of Consumers' Gas on the public authority's direction. In contrast, Mr. Robinson's assertions of civil wrong were not as serious as allegations of criminal wrong, and his arguments were strongly contrary to the apparently proper administration of the bylaw. Mr. Robinson's allegations lacked the substance of the allegations in *Garland*. For these reasons, the reasonableness of the industry defendants continuing to rely on the City's administration was not affected.

49 Thus, even if the plaintiffs were to persuade the trial judge in this action that the City's interpretation of the bylaw is wrong and that the plaintiffs' interpretation is right, the plaintiffs still cannot establish that the industry defendants had lacked a juristic reason for their enrichment up to the time of that decision at trial. The plaintiffs still would fail in establishing the third element of unjust enrichment.

50 The plaintiffs have pleaded facts suggesting that the first and second elements of unjust enrichment could be proven against the industry defendants. They have not pleaded facts, however, suggesting that the third element of unjust enrichment could be proven against the industry defendants.

51 Assuming the accuracy of the facts set out in the plaintiffs' pleadings, there is no plausible basis for supposing that the industry defendants could be held liable in unjust enrichment. That cause of action does not arise from the facts pleaded by the plaintiffs. The plaintiffs have not established that the class has an apparently authentic or genuine cause of action based on unjust enrichment.

52 Accordingly, as the requirement in s. 6(1)(a) of the Act has not been met with respect to either of the causes of action pleaded against the industry defendants, the action will not be certified with respect to the industry defendants.

Identifiable class

53 The plaintiffs propose the following class:

> All taxicab owners or drivers who, directly or indirectly, paid fees, in excess of that which the City of Saskatoon charged for the licence, to rent the Saskatoon taxicab business licence under which their taxicab operated.

54 The proposed class initially had referred to the taxicab owners or drivers having leased licences from "licensees who did not own or keep for hire or profit the subject taxicab". On seeing the City's objection to the inclusion of this phrase, which is drawn directly from the bylaw that is in issue in the action, the plaintiffs asked leave to amend the proposed class definition to remove the phrase. The defendants did not oppose that application, and I granted leave to the plaintiffs, with the result that the proposed class definition no longer includes the phrase.

55 The City says, though, that the proposed class still is deficient because the essence of the plaintiffs' claim is the interpretation of the bylaw, and so the interpretation of the bylaw defines the class. The criteria for identifying the class were discussed by Madam Justice Smith in *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, [2009] 5 W.W.R. 228 (Sask. C.A.) at para. 54:

> 54 Thus, in this passage, the objectives of the class definition were seen to be: to identify the individuals entitled to notice; to identify those entitled to relief (if awarded); and to identify those bound by the judgment. The Chief Justice considered that these objectives dictated that (1) the definition use objective criteria, (2) the criteria bear a rational relationship to the common issues asserted by all class members, and (3) the criteria not depend on the outcome of the litigation. The second of these requirements is associated with a prohibition against overly inclusive class definitions — *i.e.*, those that include individuals who have suffered no loss or injury and could not have a cause of action against the defendant. The third requirement reflects a prohibition against "merits-based" class definitions.

56 The defendants argue that the third of these requirements is contravened by the proposed class definition because the members of the class can be determined only by determining the issue in the action. The City's suggestion is mistaken, in light of the revision to the proposed class definition. The City correctly asserts that the essence of the claim is the interpretation of the bylaw, but the revised proposed class definition no longer is tied to that interpretation. The description of the proposed class is identifiable without that interpretation being made.

57 All of the defendants object that the proposed class definition is over-inclusive, in contravention of the requirement of a rational connection, the second requirement. They point to the requirement, as observed by Chief Justice McLachlin in *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 19, 2001 SCC 68 (S.C.C.), that "each of the putative class members does indeed have a claim — or at least what might be termed a 'colourable claim' — against the respondent."

58 The defendants say that the proposed class definition includes persons who do not have a colourable claim, and so the definition is cast too broadly. They raise four arguments in support of this assertion.

59 First, because the subject of the action relates to transactions occurring since 1970, the proposed class includes persons who paid fees to lease a taxicab licence so long ago that their claims would be barred by the applicable limitation period. This is a valid observation. As the claim is pleaded, and in light of Mr. Robinson's estimate that the class could include 1500 members, the proposed class is likely to include such persons, who should not be included in the class.

60 Second, the plaintiffs have not placed before me evidence that "all, a majority, or even a significant minority" of the proposed class has suffered a loss (*Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225, [2005] 7 W.W.R. 665 (Sask. Q.B.) at para. 234). At most, the evidence before me in this matter indicates that eight persons claim to have suffered a loss and wish to proceed with action. In contrast, Mr. Robinson has estimated that the class could include 1500 members. Thus I have before me evidence that eight of potentially 1500 persons claims a loss. This ratio leaves me without evidence that "all, a majority, or even a significant minority" of the proposed class has suffered a loss.

61 Third, the proposed class includes owners and drivers who are content with the current arrangements, and who have no wish to participate in this action. An example of such persons is Sabin Catana, who pays to lease taxicab licences from others. Mr. Catana indicates in his affidavit that he has no complaint with the current situation, that his contracting to lease licences has not arisen from false pretences, and that he has no wish to proceed with action. One reasonably may

expect that others share this experience and wish with Mr. Catana. I consider this evidence to be a further indication that the plaintiffs have not established that a sufficiently large enough part of the proposed class claims a loss.

62 Fourth, the defendants say that the proposed class includes persons whose connection to the subject of the action is so varied that the required rational connection is missing. They point to the evidence of Tony Rosina, operations manager of United Cabs, in which he explains the various arrangements involving taxicab owners, taxicab drivers, and licence holders. Mr. Rosina does describe a variety of arrangements. Once owners and drivers who have not paid to lease a licence are disregarded, though, the arrangements described by Mr. Rosina involve:

(i) some taxicab owners who lease a licence, and drive cab; and

(ii) some taxicab owners who lease a licence, but do not drive cab, instead arranging for someone else to drive.

63 These arrangements are not so diverse as to demonstrate a lack of rational connection. They share the common thread of payment to lease a licence, to which is tied the plaintiffs' allegation in the statement of claim that monetary loss flowed from making the lease payments.

64 Thus the fourth of the defendants' arguments is not persuasive. The first three, though, are persuasive. The proposed class definition is over-inclusive. The proposed class fails the test for an identifiable class.

Common issues

65 In discussing an identifiable class, I have touched on the common circumstance of owners or drivers having paid to lease taxicab licences. In the statement of claim, the plaintiffs have identified the allegedly excessive lease payment amounts as loss suffered by the proposed class members. Accordingly, the plaintiffs' suggestion of common issues might be expected to flow from those pleadings, relating to the three causes of action identified in the statement of claim.

66 Instead, the common issues suggested by the plaintiffs are:

> i. Who is the person entitled to apply for or renew a City of Saskatoon taxicab business license? Is it the person who owns or keeps for hire or profit the taxicab or can it be anyone else?
>
> ii. If the answer to issue i. is that anyone is entitled to apply for or renew a City of Saskatoon taxicab business license then in that case is that person entitled to charge and collect a lease fee for that license, in excess of any fee that the City of Saskatoon could collect, in effect defeating the purpose, spirit, and intent of Section 8(4) of *The Cities Act* being Chapter C-11.1 of the *Statutes of Saskatchewan, 2002* and its predecessor legislation in force from time to time.
>
> iii. What duty or standard of care did the administration of the City of Saskatoon owe to the class in administering and enforcing the relevant licensing bylaw and did it breach that duty or standard of care?
>
> iv. Can SGI issue a Certificate of Registration and license plates for a taxicab to someone who is not an owner of a taxicab?
>
> v. Can a person who is not an owner of a taxicab (or an agent of an owner of a taxicab) complete an Owners Certificate claiming to be the owner of someone else's taxicab?
>
> vi. Did the defendants save for the City of Saskatoon intentionally interfere with the with the [*sic*] trade or business of the plaintiff and class by falsely applying for Certificates of Registration and taxicab licenses when they were not qualified to do so and charging lease fees in excess of that allowed by provincial legislation.
>
> vii. Did the defendants save for the City of Saskatoon unjustly enrich themselves, at the expense of the plaintiff and class without any juristic reason therefore [*sic*].

67 The common issues suggested by the plaintiffs do not cover all of the issues flowing from their claims in negligence, unlawful interference with economic relations, and unjust enrichment. Some of the issues suggested would, in the event of certification, require some revision. Further, the suggested common issues include argument and assumptions. The question in item (ii), for example, is framed so that it can be answered in the affirmative only with a ruling that a statute has been breached. The question in item (vi) has built into it the assumption that the industry defendants were not qualified to apply for certificates of registration and taxicab licences.

68 The common issues as proposed are inadequate in terms of identifying issues for the purpose of moving the action, if it were certified, towards trial.

Preferable procedure

69 Having determined that the plaintiffs have not established an identifiable class and have not proposed appropriate common issues, I am unable to conclude that a class action proceeding is the preferable procedure for this action. The same result was adopted for the same reason in *Cole v. Prairie Centre Credit Union Ltd.*, 2007 SKQB 330, [2008] 1 W.W.R. 115 (Sask. Q.B.) at paras. 78-79, and in *Hoffman* (CA) at para. 88.

Adequate representative plaintiff

70 This action has three plaintiffs: James Robinson, Mervin N. Sawchyn and Garth Collicutt. Only Mr. Robinson has filed an affidavit on this application, and on this application the plaintiffs advance only Mr. Robinson as the representative plaintiff. As I have no information before me about Mr. Sawchyn and Mr. Collicutt, I can consider only Mr. Robinson as the representative plaintiff.

71 The defendants have raised some objections about the propriety of Mr. Robinson as the representative plaintiff, on grounds relating to Mr. Robinson himself. I need not address those objections, though, because this question is determined on the matter of the litigation plan, as required by s. 6(1)(e)(ii) of *The Class Actions Act*.

72 Mr. Robinson's proposed litigation plan appears in the first instance in one of his affidavits. For the most part, though, that plan consists only of a series of suggestions that the steps in the litigation will be conducted in accordance with *The Queen's Bench Rules*. Mr. Robinson has expanded on his litigation plan in paras. (f) - (i) of the plaintiffs' notice of motion for certification, as amended pursuant to leave that I granted at the hearing of the application:

> (f) That members of the Class who elect to opt out of the class action must do so within 60 days of the final publication of the Notice of Certification to the Class;
>
> (g) That members of the class who are no longer a resident of Saskatchewan may opt into the class action within 60 days of the publication of the final notice;
>
> (h) Notice of the Class Action, the method of participating in the class action and the deadline for participation shall be published in at least two consecutive issues of at least one daily newspaper in each of Saskatoon, Regina, Calgary, Edmonton, Vancouver, Victoria, Winnipeg, and Toronto. Said Notice to be of at least 1/4 page in size in each newspaper. Reference shall be made in each notice of the SaskatoonTaxiAction.ca website and the website shall be maintained for the duration of this action. The Notice of the Class Action shall be featured on the first page of the website and the details of participation and deadlines shall be prominently displayed.
>
> (h.1) The plaintiff will apply to the Saskatchewan Government Insurance office for all class PT Owners Certificates of Registration for Saskatoon reaching back as far as SGI has records disclosing circumstances where the Secondary Owner differs from the Primary Owner.
>
> (i) The City of Saskatoon and all of the Defendants shall each pay the costs of notification equally including the costs of obtaining all SGI certificates, the costs of preparation, design and hosting the Website and the costs of publishing

the notices. The monthly costs shall be invoiced to the defendant City and the defendants by their solicitors and it shall be paid by them within 2 weeks of service of the Invoice.

73 The plaintiffs suggest that, if this litigation plan is not sufficient, in conjunction with certification the court can direct management conferences to remedy the deficiencies. The plaintiffs also ask leave to file an amended litigation plan should this litigation plan not be sufficient.

74 An appropriate litigation plan was discussed by the Court of Appeal in *Sorotski v. CNH Global N.V.*, 2007 SKCA 104, [2008] 1 W.W.R. 386 (Sask. C.A.). Mr. Justice Richards said at para. 78:

> 78 The appropriate content of a litigation plan is necessarily dependent on the nature, scope and complexity of the litigation to which it relates. There are no fixed rules or requirements. That said, a number of cases have approved the following non-exhaustive list of matters to be addressed in a litigation plan:
>
> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and
>
> (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided....

75 The litigation plan proposed by Mr. Robinson falls far short of being adequate.

76 Proposing to remedy the deficiencies in a series of management conferences is not appropriate where the deficiencies are substantial, as they are here. Remedying a largely deficient litigation plan would render s. 6(1)(e)(ii) ineffective.

77 Likewise, granting leave to file an amended litigation plan may in part render the subsection ineffective. In any event, no reason is apparent for Mr. Robinson not having presented an appropriate litigation plan at the hearing of his application for certification.

78 As he has not presented an adequate litigation plan, I am not satisfied that Mr. Robinson is a person who meets the requirement of a representative plaintiff as described in s. 6(1)(e).

Costs

79 I am not persuaded that any of the circumstances contemplated in s. 40(2) of the Act applies, and so pursuant to s. 40(1) there is no award of costs in connection with this application for certification.

Conclusion

80 The plaintiffs have not established any of the criteria required for certification. In other circumstances, it might have been appropriate to allow the plaintiffs to pursue remedying some of the deficiencies by amendment. In this case, though, where the pleadings do not disclose a cause of action, such an order is not appropriate.

81 The application for certification is dismissed. There is no order as to costs.

Application dismissed.

2016 ONCA 24
Ontario Court of Appeal

1250264 Ontario Inc. v. Pet Valu Canada Inc.

2016 CarswellOnt 254, 2016 ONCA 24, [2016] O.J. No. 186, 264 A.C.W.S. (3d) 94, 344 O.A.C. 222

1250264 Ontario Inc., Plaintiff (Respondent/Appellant by way of cross-appeal) and Pet Valu Canada Inc., Defendant (Appellant/Respondent by way of cross-appeal)

Alexandra Hoy A.C.J.O., J. MacFarland J.A., P. Lauwers J.A.

Heard: November 3, 2015; November 4, 2015
Judgment: January 14, 2016
Docket: CA C59956

Proceedings: reversing *1250264 Ontario Inc. v. Pet Valu Canada Inc.* (2015), 2015 ONSC 29, 2015 CarswellOnt 39, [2015] O.J. No. 23, Belobaba J. (Ont. S.C.J.)

Counsel: Geoffrey B. Shaw, Derek Ronde, Eric Mayzel, for Appellant / Respondent by way of cross-appeal
Louis Sokolov, Jean-Marc Leclerc, for Respondent / Appellant by way of cross-appeal

***Alexandra Hoy A.C.J.O.*:**

I Overview

1 This appeal and cross-appeal arise in the context of a class action against a franchisor. The franchisor, Pet Valu Canada Inc. ("Pet Valu"), moved for summary judgment on the 7 common issues certified in the class action. The motion judge granted judgment in favour of Pet Valu dismissing common issues 1-5. He invited the plaintiff, 1250264 Ontario Inc. (the "plaintiff"), to move to amend its statement of claim and add an 8th common issue. The plaintiff accepted that invitation and the motion judge deferred his decision on common issues 6 and 7 until the plaintiff's motion was heard. While the motion judge ultimately dismissed the plaintiff's motion to amend and add an 8th common issue on the ground of prejudice, he read language into the court-established wording of common issue 6. On the basis of the read-in language, he then found that Pet Valu had breached its duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*AWA*") and answered common issues 6(i), (iii) and (iv) in favour of the plaintiff. Common issue 7 — damages — has not yet been determined.

2 Pet Valu appeals the motion judge's decision answering common issues 6(i), (iii) and (iv) in favour of the plaintiff. It argues that the motion judge erred by what it characterizes as unilaterally and unfairly amending common issue 6. It also argues that the motion judge made several errors in finding that it breached s. 3 of the *AWA*. The plaintiff cross-appeals the motion judge's dismissal of its motion to amend to add an 8th common issue.

3 For the reasons that follow, I would allow Pet Valu's appeal, find in favour of Pet Valu on common issues 6(i), (iii) and (iv) and dismiss the plaintiff's cross-appeal. Given that I would find in favour of Pet Valu on common issues 6(i), (iii) and (iv), there is no need to answer common issue 7, which deals with the damages Pet Valu would have been required to pay if the plaintiff had succeeded on common issue 6. In the result, I would dismiss the plaintiff's action against Pet Valu.

4 Below, I first set out the background, including the events leading to and a summary of the decision under appeal. I then proceed to the analysis that leads me to conclude that the motion judge did not err in dismissing the plaintiff's

motion to amend. Next, I set out the analyses leading to my conclusions that the motion judge, in effect, improperly amended common issue 6 and erred in concluding that Pet Valu breached s. 3 of the *AWA*.

II Background

The Plaintiff's Claim is Certified

5 Pet Valu is a wholesaler and retailer of pet food, supplies, and related services. It has almost 300 franchised stores in Canada and almost 300 corporate stores in Canada and the United States.

6 The plaintiff is a former franchisee. He sold his franchise at a considerable profit.

7 The plaintiff commenced an action against Pet Valu alleging, among other things, that Pet Valu had not shared volume rebates it received from suppliers with franchisees. The action was certified as a class action on June 29, 2011. The class consists of about 150 former Pet Valu franchisees. In reasons released January 14, 2011, the certification judge concluded that the only claim advanced by the plaintiff that was appropriate for certification was its claim in relation to the volume rebates: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287 (Ont. S.C.J.), at para. 4.

8 The certification judge identified the common issues arising out of the plaintiff's volume rebates claim and invited the parties to reach appropriate language to express those issues.

The Certification Judge Determines the Wording of the Common Issues

9 The parties were unable to agree upon the wording of the common issues and, after a further hearing, the certification judge released reasons on March 28, 2011 defining "Volume Rebates" and setting out the seven common issues in relation to the volume rebates claim included in Schedule A to these reasons: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941 (Ont. S.C.J.). The certification judge wrote, at paras. 3 and 4:

> My objective is to state common issues that fairly reflect the pleadings, the evidentiary record and the conclusions in my reasons. The common issues should be clear, neutrally-worded and fair to both parties. They should be phrased in such a way that their answers will advance the litigation.
>
> To serve these ends, the common issues should not be framed in overly broad terms. Nor should they be framed in overly narrow terms in a way that unreasonably constrains the ability of either party to prove or disprove the common issue.

10 The certification judge added, at para. 8:

> In my view, the term should be defined. I used the term "Volume Rebates" in my reasons, for convenience and for definitional purposes. I made findings, however, at paras. 20 and 21, based on Pet Valu's own documentation, that Pet Valu received rebates, allowances, discounts and other negotiated price reductions from suppliers. Based on my reasons, and the evidence, it seems to me that the following is an appropriate definition that includes those items which, on the evidence, were granted to the defendant by suppliers and manufacturers as a result of its volume purchasing:
>
>> "Volume Rebates" means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system, but does not include discounts tied to the performance of individual stores.

The Motion Judge Invites the Plaintiff to Move to Amend to Add a Further Common Issue

11 Pet Valu brought a motion for summary judgment on the seven common issues. Its motion was heard more than three years after the proceeding was certified. In the intervening period, a different judge assumed responsibility for case management of the class action.

12 In the course of that hearing, the plaintiff focused on a portion of an affidavit of Pet Valu's CEO, Thomas McNeely, sworn June 16, 2014. The plaintiff submitted that the affidavit disclosed — for the first time — that Pet Valu had little to no purchasing power. The plaintiff argued that Pet Valu had misrepresented the nature and extent of its purchasing power. The motion judge suggested to counsel that the common issues be amended to add a new one, dealing specifically with the plaintiff's new "focus" on purchasing power. Pet Valu did not agree to this suggestion. The plaintiff advised that it would move to amend the statement of claim and add an 8th common issue dealing with purchasing power.

13 The motion judge released reasons on October 31, 2014, dismissing common issues 1 through 5: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2014 ONSC 6056 (Ont. S.C.J.) (the "October Reasons"). Common issue 1 asked whether Pet Valu had breached its contractual duty to class members by failing to share Volume Rebates with them. With respect to this common issue, which the motion judge characterized at para. 2 as the "core issue", the motion judge wrote, at para. 29:

> I conclude that there were no undisclosed or "phantom" rebates; that all of the Volume Rebates were passed on and shared with the franchisees; and that the franchisor's mark-ups were not unreasonable.

14 Indeed, the motion judge found that the average franchisee's cost for products was about 15% lower than outside distributor's prices and that Pet Valu negotiated the best price it could obtain and bestowed a range of benefits on its franchisees: at paras. 20 and 27-28.

15 The motion judge indicated that, while he was initially of the view that common issues 6 and 7 should also be dismissed because common issue 6 was focused on the continuing disclosure under s. 3 of the *AWA* of financial information that was "arguably non-material", he would defer his ruling on them until after the plaintiff's motion to amend had been heard and decided.

The Motion Judge Dismisses the Motion to Amend

16 That further motion was heard on December 3 and 4, 2014.

17 While the plaintiff's new "focus" at the hearing of the summary judgment motion was on purchasing power, the plaintiff proposed to amend its statement of claim to add allegations that Pet Valu failed to disclose to its franchisees that it did not possess "substantial purchasing power" and that it did not receive "significant volume discounts" from suppliers. It asked that if its motion to amend were granted, the following be certified as common issue 8:

> Did the defendant have a duty at common law or pursuant to s. 3 or s. 5 of the *Arthur Wishart Act* to truthfully disclose to franchisees, in the disclosure document, the franchise agreement or otherwise during the course of the relationship of the parties, whether it possessed substantial or significant purchasing power and whether it received significant volume discounts offered by suppliers?
>
> [Emphasis added.]
>
> If yes, did it breach its duty or duties?
>
> If yes, what damages or remedies are the class members entitled to, if any?

18 At the outset of the hearing, the motion judge provided an unsolicited draft of what he believed common issue 8 ought to be:

What I expected:

> 8. Did the disclosure document contain a misrepresentation about the defendant's purchasing power or about its ability to receive volume discounts for the benefit of its franchisees? If so, did the class members suffer a loss? Are the class members entitled to damages under s. 7 of the [*Arthur Wishart Act*]?]

19 Pet Valu opposed the amendment.

20 On December 19, 2014, the motion judge advised the parties as follows:

> I am writing to advise all counsel that I will be releasing my decision re the Motion to Amend/ add a new Common Issue in January — the decision will DISMISS the plaintiff's Motion to Amend — I would therefore invite both sides to make any further submissions re Common Issues 6 and 7 (if they wish to do so) within the next two weeks and no later than Monday January 5....

21 Both parties made submissions.

22 In reasons released January 7, 2015, the motion judge dismissed the motion to amend on the ground of prejudice: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONSC 29 (Ont. S.C.J.) (the "January Reasons"). He explained, at para. 11, that the motion "was prompted solely by the so-called revelation in the 2014 McNeely affidavit that Pet Valu has 'little to no purchasing power'". However, the motion judge acknowledged, at para. 15, that he had misapprehended the McNeely affidavit: "[o]n a fair reading of Mr. McNeely's 2014 affidavit, it is clear that he did not mean that Pet Valu had 'little to no purchasing power'". The motion judge specifically found, at para. 11, that Pet Valu in fact has significant purchasing power.

23 At paras. 30-33, he explained further:

> The defendant's motion for summary judgment should have been concluded in full without this court suggesting and encouraging this motion to amend the pleadings and add a new common issue. Absent my judicial intervention, the summary judgment motion would have concluded and the defendant would likely have prevailed on most of the common issues.
>
> I am therefore satisfied that there is actual prejudice to Pet Valu in respect of the proposed amendments and new common issue. <u>Pet Valu was in a position to obtain complete summary judgment on the existing common issues</u> as well as a probable cost award against the representative plaintiff. This would have ended the litigation. The representative plaintiff (a defunct corporation) likely has no assets that can satisfy a judgment ...
>
> I am now satisfied that the last minute addition of a pleadings motion that adds a new common issue at the end of the summary judgment hearing tilts the class proceeding in the plaintiff's favour ...
>
> The motion is therefore dismissed solely on the ground of prejudice.
>
> [Emphasis added.]

The Motion Judge Reads Language into Common Issue 6

24 As I have indicated above, the motion judge ultimately read additional language into common issue 6, as framed by the certification judge. For ease of reference, common issues 6(i), (iii) and (iv) are set out below. The language the motion judge read into common issue 6(i) is emphasized:

> 6. Did [Pet Valu] have a duty at common law to the Class Members or under section 3 of the [*Arthur Wishart Act*] to the Ontario Class Members to disclose the following information to the Class Members or to some of them, and if so, did it breach such duty:

(i) whether [Pet Valu] or its affiliates receives Volume Rebates [received a significant level of Volume Rebates] in respect of purchases which are made by [Pet Valu] or its affiliates for wholesale to the Class Members; ...

(iii) the amount of Volume Rebates received by [Pet Valu] or its affiliates during the Class Period;

(iv) the amount of Volume Rebates retained by [Pet Valu] or its affiliates and the amount, if any, that was shared with Class Members ...?

25 The motion judge explained his reason for modifying common issue 6(i) at para. 60 of the January Reasons:

Strictly speaking, the question in 6(i) does not ask whether the franchisor "received significant volume discounts offered by suppliers" (the language in proposed Common Issue 8) but whether the franchisor "receives volume rebates." In my view, however, 6(i) should be interpreted as also asking if "significant volume discounts" were received by the franchisor. I say this for two reasons. First, counsel for Pet Valu have taken this position in their factum — that the question about "significant volume discounts" in Common Issue 8 "duplicates" existing Common [Issue] 6 and that "Pet Valu should not have to face repetitive common issues." Secondly, the more reasonable interpretation of Common Issue 6(i) in the context of this litigation is whether Pet Valu received a meaningful or significant measure of volume discounts and not just whether they received *any* amount, however meager.

26 The motion judge did not advise the parties before releasing his reasons that he was contemplating reading additional language into common issue 6(i).

The Motion Judge Finds that Pet Valu Breached Common Issue 6(i)

27 Common issue 6 asks whether Pet Valu breached a duty at common law or under s. 3 of the *AWA* to make disclosure regarding volume rebates to the franchisees. Sections 3(1) and (3) of the *AWA* provide as follows:

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

. . . . .

(3) For the purpose of this section, the duty of fair dealing incudes the duty to act in good faith and in accordance with reasonable commercial standards.

28 The motion judge examined the disclosure document provided to, and the form of franchise agreement signed by, the franchisees. While Pet Valu did not explicitly represent that it would receive significant volume rebates from suppliers, the motion judge found it had made such a representation: January Reasons, at paras. 24-25, 44-47 and 55.

29 The motion judge also found, at para. 48, that the fact that the volume discounts were, in his words, "virtually non-existent" was a "material fact" as defined in the *AWA*. (Section 5 of the *AWA* requires the franchisor to disclose "material facts" in a disclosure document that must be provided to a prospective franchisee before it signs the franchise agreement or any agreement relating to the franchise agreement or pays any consideration to the franchisor or its associates. If it fails to do so, the franchisee may rescind the franchise agreement pursuant to s. 6. The franchisee may also sue the franchisor for damages under s. 7(1) if it suffers a loss because of the franchisor's failure to comply in any way with s. 5. The common issues that were ultimately certified in relation to volume rebates did not ask if Pet Valu breached its disclosure obligations under s. 5 or whether the class members were entitled to rescind the franchise agreement or to damages under s. 7.) And, the motion judge found, the fact that Pet Valu did not receive significant volume discounts was not disclosed to franchisees until August, 2012 — well into the litigation: at para. 49.[1] The motion judge wrote that the plaintiff tried to obtain this information before commencing this lawsuit but was "rebuffed."[2]

30 The motion judge concluded, at para. 56, that Pet Valu had breached s. 3 of the *AWA*:

> In performing its contractual obligation to share volume discounts on a reasonable basis, Pet Valu had to track and record the volume discounts and share or pass them on to the franchisees by way of pricing reductions. These pricing benefits, including information about the level of volume discounts were, to say the least, important to the franchisees. By hiding or refusing to disclose information about the virtual non-existence of volume discounts — information that was "material to the matters ultimately contracted for" in the franchise agreement and was clearly related to the performance of this agreement — Pet Valu did not deal fairly or in good faith with its franchisees.

31 Although the motion judge began his analysis at para. 41 by explaining that s. 3(1) is a codification of the common law, he ultimately held that a franchisor's duty under s. 3 of the *AWA* is broader than its common law duty, as that duty was articulated by the Supreme Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.). The court in *Bhasin*, at para. 73, held that the common law duty of honesty in the performance of contractual agreements does not impose a duty of loyalty or disclosure. Instead, the duty imposes on the parties a "simple requirement not to lie or mislead the other party about one's contractual performance." The motion judge distinguished this case from *Bhasin* on the basis that *Bhasin* dealt with good faith in the common law and not in the context of franchise relationships and the special considerations that arise under s. 3 of the *AWA*.

32 The motion judge held, at para. 58, that, in a franchise context, a breach of s. 3 of the *AWA* can be found if a franchisor fails to disclose important and material facts that relate to the ongoing performance of the franchise agreement. For this proposition, he relied on *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 268 O.A.C. 279 (Ont. C.A.); *1159607 Ontario Inc. v. Country Style Food Services Inc.*, 2012 ONSC 881, 2 B.L.R. (5th) 315 (Ont. S.C.J.), aff'd 2013 ONCA 589 (Ont. C.A.); *Burnett Management Inc. v. Cuts Fitness for Men*, 2012 ONSC 3358, 4 B.L.R. (5th) 234 (Ont. S.C.J.) and *1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.* (2009), 55 B.L.R. (4th) 265 (Ont. S.C.J.). He distinguished *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563 (Ont. S.C.J.), saying that *Spina* only held that s. 3 does not impose disclosure obligations for routine or non-material information.

III Did the Motion Judge Err in Dismissing the Plaintiff's Motion to Amend and Add An 8th Common Issue?

33 The plaintiff advances two arguments in support of its cross-appeal.

34 First, it argues that the motion judge was obviously incorrect in finding prejudice on the basis that, but for the motion judge's intervention, Pet Valu was in a position to obtain complete summary judgment on the existing common issues. This, it says, was demonstrated by the motion judge's subsequent ruling in the plaintiff's favour on common issue 6.

35 Second, it argues that neither the motion judge's intervention nor the late timing of the motion constituted prejudice warranting a refusal to amend. It says that class proceedings "evolve as they work their way through the certification and case management process and ... the case management judge plays an important role in guiding the evolution of the proceeding": *Brown v. Canada (Attorney General)*, 2013 ONCA 18, 114 O.R. (3d) 355 (Ont. C.A.), at para. 45. And, it submits, a plaintiff may even reformulate the class definition and common issues on appeal, provided there is no procedural unfairness to a defendant: *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, 125 O.R. (3d) 447 (Ont. C.A.), at paras. 23-24.

36 I reject these arguments.

37 As I explain below, the motion judge's conclusion on common issue 6 was founded on what was effectively an impermissible amendment of that common issue. The motion judge recognized that, but for his suggestion that the plaintiff move to amend its pleadings and add an 8th common issue, Pet Valu was in a position to obtain complete summary judgment on the common issues as well as a probable cost award. I agree with the motion judge that, in the circumstances, allowing the plaintiff to amend its statement of claim and add an 8th common issue would have caused an injustice to Pet Valu, not compensable in costs.

38 While the case management judge in a class proceeding unquestionably plays an important (and challenging) role in guiding the evolution of the proceeding, that role does not permit him to descend into the arena and make a suggestion at the conclusion of an otherwise dispositive summary judgment motion as to how a plaintiff might improve its position. The motion judge acknowledged this when he dismissed the plaintiff's motion to amend: January Reasons, at para. 32.

39 *Brown* does not assist the plaintiff. In *Brown*, the class proceeding case management judge found that the current pleading did not disclose a cause of action for breach of fiduciary duty or negligence. However, he identified how such claims might be pleaded, granted the plaintiffs leave to amend, and certified the action, subject to the plaintiffs amending their statement of claim in accordance with his framing of the questions. This court agreed with the Divisional Court that the class proceeding case management judge erred in conditionally certifying the class action in the absence of a statement of claim that disclosed a cause of action. The effect of his doing so was to deprive the defendants of the opportunity to meaningfully respond to the application for certification.

40 Following the passage in *Brown* that the plaintiff quotes, the court stated that, in the class action context, the power to amend the statement of claim and other aspects of the claim, such as the proposed common issues, "should be exercised with caution and restraint": at para. 45. When the amendment is sought at the conclusion of an otherwise dispositive summary judgment motion, even greater caution and restraint is called for.

41 Nor does *Keatley* assist the plaintiff. In that case, this court was asked to determine whether the Divisional Court erred in considering revised proposals for certification that differed from those presented before the certification judge. The court concluded that it did not. The changes proposed by the plaintiff did not "fundamentally [change] the nature of the case presented ... in a way that would prejudice [the defendant]" and the defendant was not at any procedural disadvantage in arguing the point. It was given an opportunity to respond. The court held that, on an appeal from an unsuccessful *certification motion*, the appeal court could consider a revised class definition and revised proposed common issues if the changes did not cause the defendant any prejudice or disadvantage that could not be compensated for by costs.

42 *Keatley* therefore stands for the proposition that, at an appeal at the certification stage, a plaintiff should have some latitude to recast its case to make it more suitable for certification, provided that the defendant is afforded procedural fairness.

43 The circumstances of this case differ materially from those in *Keatley*. In this case, the motion judge found that allowing a pleadings amendment and the addition of the newly proposed common issue 8 would cause actual prejudice to Pet Valu that was not compensable in costs: January Reasons, at paras. 29-32. I agree. As discussed above, the motion to amend was prompted by the motion judge more than three years after certification and followed the hearing of a summary judgment motion. Absent the motion judge's intervention to suggest the adding of a new common issue — which was based on his misunderstanding of the 2014 McNeely affidavit — the litigation would have concluded and the defendant would have been in a position to obtain complete summary judgment on the existing common issues. Certifying a new common issue that was fundamentally different than the issues certified more than three years before would have been fundamentally unfair to Pet Valu.

44 Accordingly, the motion judge did not err in denying the plaintiff's motion to amend its statement of claim and add an 8th common issue.

IV Did the Motion Judge Err in Interpreting 6(i) as Also Asking if "Signficant Volume Discounts" Were Received by the Franchisor?

45 For several reasons, I conclude that the answer to the above question is "yes" and I would allow the appeal on this basis alone.

46 As I have set out above, the precise wording of common issue 6(i) was determined by the certification judge after submissions by the parties and after careful consideration.

47 The addition of the words "significant volume discounts" was material. They parrot the "significant volume discount" language in the rejected proposed amendments to the statement of claim and the proposed common issue 8. The addition of these words was tantamount to an amendment of common issue 6(i).

48 In the absence of certified common issues asking whether Pet Valu represented to franchisees that Pet Valu received significant volume discounts and breached that representation, and whether Pet Valu had breached its disclosure obligations under s. 5 of the *AWA*, the motion judge used these words to justify those very inquiries. Then, he seemingly equated non-disclosure of the breach of that representation to unfair dealing by Pet Valu in the "performance" of the franchise agreement to find a breach of s. 3 of the *AWA*. The motion judge himself acknowledged that, had he not intervened to suggest the adding of a new common issue (or, in other words, had he not read these words into common issue 6(i) and proceeded on the basis of the common issue as originally worded), the summary judgment motion would have concluded and Pet Valu likely would have succeeded on the summary judgment motion: at paras. 30-31.

49 Most significantly, the motion judge recast common issue 6(i) on his own initiative, following the completion of the summary judgment motion, without advising Pet Valu that he proposed to make this change and affording Pet Valu the opportunity to make submissions. In effect, he gave judgment on an issue that was never certified. Doing so was fundamentally unfair to Pet Valu.

50 At para. 60 of the January Reasons, the motion judge provides a summary of a submission by Pet Valu, at para. 85 of its responding factum, opposing the plaintiff's motion to amend: "the question about 'significant volume discounts' in Common Issue 8 'duplicates' existing Common [Issue] 6". The motion judge then relied on this as one of two reasons for interpreting common issue 6(i) in the manner that he did.

51 The submission at issue read as follows: "[t]he reference to a duty of disclosure regarding "volume discounts" duplicates existing common issues #6 and 7." Common issue 6 asks if Pet Valu had a duty to disclose whether it received Volume Rebates (6(i)) and the amount of Volume Rebates received 6(iii)). There is overlap, but the motion judge's addition of the words "significant volume discounts" to common issue 6 had reaching implications that Pet Valu could not reasonably have anticipated. Pet Valu's submissions would undoubtedly have been different if it were addressing a proposed change to the language of common issue 6, and not the proposed addition of another common issue.

52 Moreover, if the parties had the opportunity to make submissions, the effect of the addition of the words would also have been explored. Proceeding in the manner the motion judge did deprived him of the benefit of the parties' submissions on the theory of liability he adopted in his reasons. It was not "tested in the crucible of the adversarial process": *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677 (Ont. C.A.), at para. 6, citing *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.). And, as I conclude below, the motion judge's theory of liability was flawed.

V Did the Motion Judge Err in Concluding that Pet Valu Breached S. 3 of the Awa?

53 I have explained that the motion judge erred (i) by considering whether Pet Valu had represented to franchisees that Pet Valu received significant volume discounts and had breached that representation and (ii) by effectively considering whether Pet Valu breached its disclosure obligations under s. 5 of the *AWA* in the absence of certified common issues asking those questions and in the absence of submissions by the parties on those issues. His conclusion that Pet Valu breached s. 3 of the *AWA* is rooted in a breach of what he found was a representation that Pet Valu received significant volume discounts and an effective breach of s. 5 of the *AWA*. For that reason alone, it cannot stand.

54 I will not comment on the motion judge's case-specific finding that the franchise agreement contained a representation that Pet Valu received significant volume discounts. For the purpose of the discussion that follows,

whether his interpretation was correct or not is immaterial. (I say "correct" because in these circumstances I would not accord his interpretation deference.)

55 Nor will I address the palpable and overriding errors that Pet Valu alleges the motion judge made in finding: (a) that Pet Valu "rebuffed" the plaintiff's request for information; (b) that volume rebates were "meagre"; and (c) that the fact that Pet Valu did not receive significant volume-based benefits from its suppliers was — in the context of the benefits that the motion judge found the franchisor did provide — a "material fact" as defined in the *AWA*.

56 I will however comment, briefly, on the motion judge's conclusion that Pet Valu breached s. 3 of the *AWA*. In my view, even if the motion judge were correct in finding that Pet Valu represented to franchisees that it received "significant volume discounts" in disclosure documents or the franchise agreement, he cast the net of s. 3 too widely.

57 Section 3(1) of the *AWA* imposes a duty of fair dealing on the franchisor in the "performance and enforcement" of the franchise agreement. Assuming, but not deciding that, post-*Bhasin*, non-disclosure by a franchisor in the course of the performance or enforcement of the franchise agreement can constitute a breach of s. 3 of the *AWA*, the "non-disclosure" in this case did not amount to such a breach.

58 *Salah* and *Country Style*, on which the motion judge relied, involved deliberate non-disclosure by the franchisor regarding the status of the lease for the franchisee's premises in the context of the contractually-provided for renewal of the franchise. In both cases, the franchisor's conduct arose squarely within the "performance" of the franchise agreement.

59 In my view, the same cannot be said in this case. If indeed material, the information that the motion judge found Pet Valu should have disclosed was information that should have been disclosed *before* the appellants became franchisees. The motion judge did not imply a contractual obligation to provide ongoing disclosure regarding the level of volume discounts (and I see no basis in the franchise agreement or disclosure document for doing so.) And there was no indication that non-disclosure once the appellants became franchisees adversely affected them in any way. How, then, can Pet Valu be said to have not dealt fairly or in good faith in the performance of the franchise agreement?

60 This case is more like *Spina*. In *Spina*, Perell J. found that it was plain and obvious that what he characterized as a "pre-litigation oriented duty of disclosure" went well beyond the scope of s. 3. The franchisee alleged that the franchisor breached s. 3 of the *AWA* by failing to disclose financial information necessary for the franchisees to verify whether the franchisor was meeting its obligations under the franchise agreement. Perell J. wrote at para. 218:

> The Plaintiffs would require [the franchisor] to provide information to verify that it has not breached the [agreement], with the Plaintiffs themselves defining what is or is not a breach of the [agreement].

61 Here, the motion judge effectively found that Pet Valu had breached s. 3 of the *AWA* by failing to disclose information necessary for the appellants to verify whether or not Pet Valu had breached a representation under the franchise agreement that Pet Valu received "significant volume discounts". It is akin to the pre-litigation oriented duty of disclosure rejected in *Spina*.

62 Nor would I characterize a failure to include all material facts in a disclosure document as unfair dealing in the "performance" of a franchise agreement. A "material fact" is defined in s. 1(1) of the *AWA* as follows:

> "material fact" includes any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of <u>the franchise to be granted or the decision to acquire the franchise.</u>
>
> [Emphasis added.]

63 The franchisor is required to provide a disclosure document *before* the prospective franchisee signs the franchise agreement and to disclose any material change: *AWA*, s. 5. Moreover, ss. 6 and 7 of the *AWA* provide specific remedies for the franchisor's failure to comply with s. 5.

64 I turn now to the disposition in this case.

VI Disposition and Costs

65 As I indicated at the outset of these reasons, I would dismiss the plaintiff's cross-appeal and allow Pet Valu's appeal. I would also find in favour of Pet Valu on common issues 6(i), (iii) and (iv). There is therefore no need to answer common issue 7, which asks what, if any, damages Pet Valu is required to pay if it breached the duties which are the subject of common issue 6. In the result, I would dismiss the plaintiff's action against Pet Valu.

66 The motion judge indicated in the January Reasons that, but for his suggestion that the plaintiff move to amend its pleadings and add an 8th common issue (or, in other words, if he had considered common issue 6 as it was originally worded), Pet Valu was in a position to obtain complete summary judgment. In the October Reasons, at paras. 33-36, he indicated that, if s. 3 of the *AWA* could be used to compel ongoing disclosure, it could only be used to compel disclosure of material information. In the context of his finding that Pet Valu franchisees benefited from materially lower product pricing, he characterized information such as whether Pet Valu received Volume Rebates and the amount of those rebates as "arguably non-material".

67 In the circumstances, it is unnecessary to return common issues 6(i), (iii) and (iv) to the motion judge for determination. As will be apparent from my comments above in relation to s. 3 of the *AWA*, I agree with the motion judge's initial view, based on the common issues as originally framed, that Pet Valu did not have a duty under s. 3 to disclose whether it received Volume Rebates, the amount of Volume Rebates it received or the amount that it shared with franchisees. Section 3 imposes a duty of fair dealing on the franchisor in the "performance and enforcement" of the franchise agreement. If, post-*Bhasin*, non-disclosure can breach s. 3, it did not do so in this case. The disclosure at issue was not withheld in bad faith in connection with Pet Valu's performance or enforcement of the franchise agreement.

68 I would award Pet Valu its costs of the appeal and cross-appeal, fixed in the amount of $25,000, inclusive of disbursements and HST. Counsel advised that costs below have not yet been fixed. They should be fixed by the motion judge, having regard to these reasons.

***J. MacFarland J.A.*:**

I agree

***P. Lauwers J.A.*:**

I agree

Schedule A

Certified Common Issues

1 Has the defendant breached its contractual duty to the Class Members at any time during the Class Period by failing to share Volume Rebates with them?

2 If the answer to common issue # 1 is yes, has the defendant breached its contractual duty to the Class Members at any time during the Class Period by:

(a) charging a mark-up on private label products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products?

(b) imposing a distribution charge on the price of products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products?

3 Has the defendant breached the duty of fair dealing to the Ontario Class Members under section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "A.W.A.") by any of the conduct described in common issues 1 and 2 above, if so found?

4 If the conduct described in common issues 1 and 2 above did not constitute a breach of the Franchise Agreement, has the defendant been unjustly enriched by such conduct, if so found?

5 What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 3 above, or the aggregate amount of compensation for unjust enrichment, if so found?

6 Did the defendant have a duty at common law to the Class Members or under section 3 of the A.W.A. to the Ontario Class Members to disclose the following information to the Class Members or to some of them, and if so, did it breach such duty:

(i) whether the defendant or its affiliates receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members;

(ii) the defendant's policy in respect of the allocation of Volume Rebates to Class Members and, in particular, whether the defendant complied with sections 22(e) and (f) and 23(c) of the Franchise Agreement;

(iii) the amount of volume rebates received by the defendant or its affiliates during the Class Period;

(iv) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with Class Members;

(v) the criteria that were used by the defendant to determine how much of the Volume Rebates were retained and how much, if any, were shared with the Class Members?

7 If the answer to common issue 6 is yes, is the plaintiff entitled to an order requiring the defendant to disclose such information forthwith and what damages, if any, is the defendant required to pay for the breach of such duty?

Appeal allowed, cross-appeal dismissed.

Footnotes

1 In his affidavit of August 3, 2012 in connection with the summary judgment motions, Mr McNeely deposed that Pet Valu did not receive significant volume based benefits from its suppliers. At the time, the issue was the plaintiff's alleged entitlement to volume-based benefits. Pet Valu's position was that it was not required to pass on volume-based benefits to its franchisees, but in fact did so.

2 In a letter to Pet Valu dated November 4, 2009, the plaintiff expressed concern about the return on its investment. It asserted that Pet Valu was obligated to share volume discounts with it and sought disclosure, within 14 days, of, among other things, the amount of volume discounts that Pet Valu had received. It alerted Pet Valu to the possibility of litigation. Pet Valu disputes that it "rebuffed" the plaintiff's attempts to obtain information and points to a responding letter it sent on December 1, 2009, setting out that it needed more time to gather the information due to a recent change in company ownership and that it was willing to discuss any issues raised in the November 4 letter on an ongoing basis. The plaintiff issued its statement of claim in the class action eight days later on December 9, 2009.

2001 SCC 46, 2001 CSC 46
Supreme Court of Canada

Western Canadian Shopping Centres Inc. v. Dutton

2001 CarswellAlta 884, 2001 CarswellAlta 885, 2001 SCC 46, 2001 CSC 46, [2000] S.C.J. No. 63, [2001] 2 S.C.R. 534, [2001] A.W.L.D. 432, [2002] 1 W.W.R. 1, 106 A.C.W.S. (3d) 397, 201 D.L.R. (4th) 385, 253 W.A.C. 201, 272 N.R. 135, 286 A.R. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, J.E. 2001-1430, REJB 2001-25017

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill, Appellants/ Respondents on cross-appeal and Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc., Respondents/Appellants on cross-appeal

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour, LeBel JJ.

Heard: December 13, 2000
Judgment: July 13, 2001
Docket: 27138

Proceedings: additional reasons to (December 13, 2000), Doc. 27138 (S.C.C.); reversing in part (1998), 228 A.R. 188 (Alta. C.A.); affirming (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.)

Counsel: *Barry R. Crump*, *Brian Beck*, *David C. Bishop*, for Appellants/Respondents on Cross-Appeal
Hervé H. Durocher, *Eugene J. Erler*, for Respondents/Appellants on Cross-Appeal

The judgment of the court was delivered by *McLachlin C.J.C.*:

1 This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc., under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

I. Facts

3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in Western Canadian Shopping Centres Inc. ("WCSC"). WCSC was incorporated by Joseph Dutton, its sole shareholder, for the purpose of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal Trust"), and would be released to WCSC upon conditions, subsequently amended.

5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for $5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further $16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

6 To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of $22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

7 In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton $1.6 million in cash; (3) Claude advanced Dutton a $1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of $50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for $200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

8 Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of $2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of $9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a *pro rata* claim on the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Muh-Min and Hoi-Wah commenced this action. The gravamen of the complaint is that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

II. Statutory Provisions

10 *Alberta Rules of Court*, Alta. Reg. 390/68

> **42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.
>
> **129** (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or

(c) it may prejudice, embarrass or delay the fair trial of the action, or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

187. A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.

201 A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

III. Decisions

11 The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.) for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

12 On the first issue, the chambers judge relied on the decision of Master Funduk in *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.* (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

13 On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying on *353850 Alberta*, *supra*, and on the decision of the British Columbia Supreme Court in *Shaw v. Vancouver Real Estate Board* (1972), 29 D.L.R. (3d) 774 (B.C. S.C.). He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

14 On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or "beyond doubt" or "plain and obvious" that the claim is deficient — the standard applied to applications to strike pleadings for disclosing no reasonable claim: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (Alta. C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

16 The Alberta Court of Appeal, *per* Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: (1998), 73 Alta. L.R. (3d) 227 (Alta. C.A.). The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing *Pasco v. Canadian National Railway*, [1989] 2 S.C.R. 1069 (S.C.C.), in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it granted the defendants the right to discovery from each of the 231 plaintiffs

on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

17 Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike *Pasco* , the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (*idem*).

IV. Issues

18

1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?

2. Did the courts below err in denying defendants' motion to strike under Rule 42?

3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

V. Analysis

A. The History and Functions of Class Actions

19 The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute to be made parties. The aim of the courts of equity was to render "complete justice" — that is, to "arrange[] all the rights, which the decision immediately affects": F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (1837), at p. 3; see also C.A. Wright, A.R. Miller and M.K. Cane, *Federal Practice and Procedure* (2nd ed. 1986), § 1751; J. Story, *Equity Pleadings* (10th ed. 1892), at s. 76*a*. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J.A. Kazanjian, "Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in *Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265 (Eng. Ch.), members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be parties" (p. 265); see also Kazanjian, *supra*, at p. 401; G.T. Bispham, *The Principles of Equity* (8th ed. 1909), at para. 415; S.C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 *Colum. L. Rev.*

866, at pp. 867 and 872; J.K. Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984), 4 *Windsor Y.B. Access Just.* 229, at p. 236.

21 The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, *supra*, at p. 401; Yeazell, *supra*, at p. 867; *City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (Eng. Ch.) (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

22 The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace," which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, *supra*, at § 1751; Z. Chafee, *Some Problems of Equity* (1950), at p. 201, T.A. Roberts, *The Principles of Equity* (3rd ed. 1877), at pp. 389-92; Bispham, *supra*, at para. 417.

23 The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, *supra*, at p. 411. As stated in *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238 (Eng. Ch. Div.), at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".

24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the *Rules of Procedure*:

> 10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such actions, on behalf or for the benefit of all parties so interested.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., *Duke of Bedford v. Ellis* (1900), [1901] A.C. 1 (U.K. H.L.); *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (U.K. H.L.)), later cases sometimes took a restrictive approach (see, e.g., *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (Eng. K.B.). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century — the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W.K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M.A. Eizenga, M.J. Peerless and C.M. Wright, *Class Actions Law and Practice* (1999), at § 1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at § 1.7; Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law — The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 *Harv. L. Rev.* 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at § 1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

B. The Test for Class Actions

30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, Federal Rule of Civil Procedure 28 U.S.C.A. § 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, *Civil Procedure Rules 1998*, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting such legislation: see Manitoba Law Reform Commission, Report #100, *Class Proceedings* (January 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

31 Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act, 1873* govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*:

> **42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

32 Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members

may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

33 Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: *Bell v. Wood*, [1927] 1 W.W.R. 580 (B.C. S.C.), at pp. 581-82; *Langley v. North West Water Authority*, [1991] 3 All E.R. 610 (Eng. C.A.), leave denied, [1991] W.L.R. 711n (Eng. H.L.); *N.A.P.E. v. Newfoundland (Treasury Board)* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. T.D.); W.A. Stevenson and J.E. Côté, *Civil Procedure Guide, 1996*, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

35 Alberta courts moved to fill the procedural vacuum in *Korte*, *supra*. *Korte* prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

36 The *Korte* criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, [1984] 4 W.W.R. 706 (Man. Q.B.); *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Sask. Q.B.); *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (N.B. Q.B.); *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321 (N.B. Q.B.); *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (N.S. S.C.), at para. 7; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I. T.D.), at para. 24.

37 The *Korte* criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario *Class Proceedings Act, 1992*, s. 5(1); British Columbia *Class Proceedings Act*, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec *Code of Civil Procedure*, art. 1003.

38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members,

the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *supra*, at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), at paras. 10-11.

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

40 Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

42 While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally *not* constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario *Class Proceedings Act, 1992*, s. 6; British Columbia *Class Proceedings Act*, s. 7; see also Alberta Law Reform Institute, *supra*, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits

the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of *whether* the claim should be prosecuted at all, Rule 42 is directed at the question of *how* the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": *Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094 (Eng. C.A.), at pp. 1101-2 (quoted in *Hunt*, *supra*). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action *if* certain conditions are met.

46 The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), precludes a generous approach to class actions. I respectfully disagree. First, when *General Motors of Canada Ltd.* was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since *General Motors of Canada Ltd.* has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, *supra*, at pp. 3-4.

47 Second, *General Motors of Canada Ltd.* on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use." The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

50 Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, *supra*, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful:

see Ontario *Class Proceedings Act, 1992*, s. 25; British Columbia *Class Proceedings Act*, s. 27; Quebec *Code of Civil Procedure*, art. 1039.

51 The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

C. Whether the Investors Have Satisfied Rule 42

52 The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors ... who each invested at least the sum of $150,000.00 into a fund totalling $34,065,000.00, the said sum to be managed, administered and secured by ... Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties which they breached. While the investors' Amended Statement of Claim alludes to claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

55 The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

56 The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

57 I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

D. Cross-Appeal

58 The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

59 I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

VI. Conclusion

61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

62 Costs of the appeal and cross-appeal are to the respondents.

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident accueilli.

2002 CarswellOnt 3569
Ontario Superior Court of Justice

Fehringer v. Sun Media Corp.

2002 CarswellOnt 3569, [2002] O.J. No. 4110, 118 A.C.W.S. (3d) 16, 27 C.P.C. (5th) 155

Vanessa Fehringer, Plaintiffs and Sun Media Corporation, Sun Media (Toronto) Corporation and Toronto Sun Publishing Corporation, Carrying on Business as The Toronto Sun and Norm Betts, Also Known as Norman Betts, Defendants

Nordheimer J.

Heard: October 16, 2002
Judgment: October 28, 2002
Docket: 00-CV-183721

Counsel: *Raymond G. Colautti*, *Jeffrey Raphael*, for Plaintiff
Paul Tushinski, for Defendants, Sun Media Corporation, Sun Media (Toronto) Corporation, Toronto Sun Publishing Corporation
Lois B. Roberts, for Defendant, Norman Betts

***Nordheimer J.*:**

1 The plaintiff moves to certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

2 The claims made by the plaintiff arise out of the alleged actions of the defendant, Betts, while he was employed by the Sun defendants as a photographer for the Toronto Sun newspaper. That newspaper includes, as a daily aspect of its publication, pictures of women referred to as "Sunshine Girls". It is alleged that over a period of many years, Mr. Betts used his position, as a photographer assigned to photograph women who wished to be selected as Sunshine Girls, to force the members of the proposed class to pose nude or topless and to be subjected to lewd comments and suggestions as well as other inappropriate conduct.

3 The proposed class is defined in paragraph 5 of the statement of claim in the following terms:

> All persons who claim to have been subject to harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks during photographing sessions with the Defendant, Betts, while Betts was an employee, agent, dependant contractor or representative of The Sun.

4 The conduct complained of regarding Mr. Betts is said to have occurred as earlier as 1971 and to have continued through to the early part of 2000 when he resigned his position with the Sun defendants. It is unknown how many women may have been subjected to the alleged conduct. In the plaintiff's affidavit filed in support of this motion, she estimates that Mr. Betts would have photographed approximately 2,500 persons during his time and from that number states that it is "possible" that approximately 15% of those persons, or 375 persons, would fall within the class definition. It is admitted that this calculation is nothing more than a guess. What is known is that approximately 50 persons have contacted counsel for the plaintiff and have indicated that they had like experiences involving Mr. Betts.

5 It is asserted by the plaintiff that Mr. Betts occupied a position of power, authority and trust over the members of the proposed class and that he used that position to carry out the alleged improper activities. It is further asserted that the Sun defendants placed Mr. Betts into that position and are therefore liable for his actions arising from his abuse of that position. It is also asserted that the Sun defendants owed a duty of care to the members of the proposed class

because the members of the proposed class are said to have been particularly vulnerable to inappropriate conduct given they were all young women at the time of the alleged events. It is also asserted that the Sun defendants are liable on the basis of systemic negligence arising from the failure of the Sun defendants to have proper procedures or controls in place to prevent such improper activities as well as from the failure of the Sun defendants to take action as complaints continued to be received by them regarding the activities of Mr. Betts.

6 The plaintiff claims damages on behalf of the proposed class in the amount of $10 million as well as punitive, exemplary and aggravated damages in the amount of $10 million.

7 Paragraph 35 of the Statement of Claim states, *inter alia*, that the members of the proposed class have undergone and will continue to undergo in the future, therapy, rehabilitation, hospitalization and other forms of medical treatment and medication. However, the defendants point out that at her cross-examination, the plaintiff acknowledged that at no time had she ever received therapy, rehabilitation, hospitalization, medical treatment and/or medication as a result of the alleged conduct of Mr. Betts towards her. The plaintiff also acknowledged that the individuals, who have, to date, indicated their interest in being class members, each have different stories to relate regarding their experiences with Mr. Betts. The plaintiff also admitted that the various alleged incidents involving Mr. Betts occurred both on and off Toronto Sun property.

Analysis

8 In order to have an action certified as a class proceeding, the plaintiff must satisfy the requirements of section 5(1) of the *Class Proceedings Act, 1992* which requires that (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiffs; (c) the claims of the class members raise common issues; (d) the class proceeding would be the preferable procedure for the resolution of the common issues; and (e) the representative plaintiffs (i) would fairly and adequately represent the interests of the class, (ii) have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) do not have, on the common issues for the class, an interest in conflict with the interests of the other class members. While the defendants principally dispute the common issues and preferable procedure requirements, since they raises issues with respect to each of the requirements, I will deal with all five requirements.

9 Before turning to the individual requirements, I wish to mention that substantial time was spent in the various parties' facta, and in their submissions at the hearing of the motion, dealing with the merits of the claims advanced. I have specifically avoided reciting the details of the alleged incidents, or addressing the submissions as to the strength or weaknesses of the claims advanced, because it is clear that on a certification motion the merits of the claims are not to be measured. As Chief Justice McLachlin said in *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at para. 16:

> Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim 'disclose ... a cause of action': see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: [citations omitted]

A. Cause of action

10 This case is somewhat unusual on the issue of whether there is a cause of action disclosed by the statement of claim. The statement of claim pleads causes of action in negligence, fiduciary duty, misrepresentation and breach of contract. Earlier in this action, on a Rule 21 motion brought by the defendants, Mr. Justice Cumming struck out the claim for fiduciary duty. That decision was appealed to the Court of Appeal who reversed the decision — see *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 2919 (Ont. C.A.). In his endorsement, Chief Justice McMurtry said, at para. 2:

> In our view, the cause of action for fiduciary duty is sufficiently pleaded in the statement of claim and the particulars supplied, and it cannot be said to be plain and obvious that that claim must fail at trial.

11 The Court of Appeal's decision is a clear finding that the statement of claim discloses a cause of action for breach of fiduciary duty. From my review of the statement of claim, the other causes of action are also sufficiently pleaded, at least for the purposes of the requirements of that subsection. Therefore the requirement of section 5(1)(a) is met.

B. Identifiable class

12 In terms of an identifiable class, I find the current definition of the proposed class to be problematic because it is overly broad. The class definition includes any person who claims to have been subject to inappropriate conduct of Mr. Betts regardless of whether that conduct is related to his employment by the Sun defendants. In other words, if Mr. Betts was involved in the type of conduct alleged against him outside of his position as a Toronto Sun photographer, persons subject to that conduct would be part of the proposed class notwithstanding that there would appear to be no basis in such circumstances for any claim against the Sun defendants.

13 Problems with the proposed class definition were addressed by Chief Justice McLachlin in *Hollick v. Metropolitan Toronto (Municipality)*, *supra*, where she said, at para. 21:

> There must be some showing, however, that the class is not *unnecessarily* broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: [citations omitted] [original emphasis]

14 While I accept that it might be possible to amend the class definition to address this issue, because of the view I take regarding the other requirements under the Act, that is not the appropriate option to follow in this case.

C. Common issues

15 The common issues as set out at para. 44 of the plaintiff's factum are as follows:

> (a) Were the Defendants negligent, in breach of their duty of care and/or in breach of their fiduciary duty in failing to take reasonable steps or measures in the operation or management of The Sun to protect class members from harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks during photography sessions?
>
> (b) Is The Sun vicariously liable for the actions of Betts?
>
> (c) Is The Sun liable to the Class members by virtue of being the owner and/or operator of the premises in which the harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks, occurred?
>
> (d) What information or knowledge did the Defendants have regarding the harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks occurring to Class members and when was it available to them or reasonably available to them?
>
> (e) Were the defendants so negligent, reckless and/or guilty of conduct that justifies an award of punitive damages?
>
> (f) Did the defendants make negligent, reckless and/or fraudulent misrepresentations regarding the nature and safety of their photography sessions and of being a Sunshine Girl?

16 The question on a motion for certification is whether the resolution of the proposed common issues is going to move the litigation forward to a sufficient degree so as to justify the certification of the action as a class proceeding. In reaching a conclusion on this requirement, the court will necessarily need to engage in an examination of the significance of the

common issues in relation to any individual issues. Usually the concern under this requirement is whether significant individual issues will be left to be decided after the common issues are decided such that the conclusions on the common issues do not substantially advance the overall determination of liability. In this case, however, my concern is that it is virtually impossible to embark on a trial of the common issues until the facts which form the basis for all of the individual claims have been presented.

17 Put another way, it is simply not possible to make a blanket determination of the liability of any of the defendants without first engaging in an individual examination of the specific events which underlie each member's claim. That such an individual examination needs to be made regarding the liability of Mr. Betts is self-evident. What he may or may not have done in respect of each putative class member, where and in what circumstances, the response of the person and other like matters would need to be known to determine any liability of Mr. Betts to that individual. Indeed, one will notice from a review of the proposed common issues that they do not actually address Mr. Betts' liability to any member of the proposed class, except in relation to the issue of punitive damages. However, without knowing the specifics of the conduct between Mr. Betts and each individual member of the proposed class, I do not see how one could proceed to determine the potential liability of the Sun defendants. Any conclusion regarding vicarious liability requires an examination of what happened, where it happened, when it happened, the state of the knowledge of the Sun defendants at the time of the occurrence and like matters.

18 The issue of an employer's liability for the sexual misconduct of an employee was extensively canvassed in *B. (P.A.) v. Curry* (1999), 174 D.L.R. (4th) 45 (S.C.C.). It is apparent from a review of that decision that the determination of vicarious liability is very much fact driven. As Madam Justice McLachlin said, at para. 46:

> In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability — fair and efficient compensation for wrong and deterrence. <u>This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing</u>. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing. [emphasis added]

19 I also question how the court could determine the issue of systemic negligence without knowing the particulars of the incidents complained of. Put another way, it would be difficult to determine whether the management and operational procedures of the Sun defendants were, or were not, adequate to deal with the possibility of such conduct occurring without knowing what the conduct was, where it occurred, when it occurred, how it occurred, whether it was reported to these defendants and, if it was, what steps, if any, were taken as a consequence.

20 This is not a case like *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) upon which the plaintiff relies as a case similar to hers. In *Rumley*, the existence of the abuse committed on the class members was already established through two separate government reports. The issue then became, given that abuse had occurred, whether the school had failed to have in place and to follow proper procedures in order to protect the children for whom, it was not disputed, the school had responsibility. As Chief Justice McLachlin said, at para. 36:

> There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members.

21 Here, however, the individual issues are front and centre. Each individual member of the proposed class will have to establish the fact that she was subjected to improper conduct, when it occurred, where it occurred and so on. It may be that issues of consent will arise in some cases. Without knowing all of these specifics, I fail to see how any conclusion

could be reached with respect to whether the Sun defendants should have prevented the abuse, assuming abuse occurred, or whether they ought to have responded in a different fashion.

22 Furthermore, many of the individuals' claims will give rise to individualized defences. Principal among those is the application of limitation periods. Certain of the causes of action are subject to a six year limitation period whereas others are subject to a four year limitation period. Still others, notably breach of fiduciary duty, are not subject to a limitation period at all. Insofar as limitation periods do apply, since the principle of discoverability is to govern the application of all limitation periods [1], to respond to such defences for each class member, there will have to be inquiries as to the knowledge of the class member in terms of the impact or harm on her arising from the conduct to which she may have been subjected and the time she became aware of same. As Mr. Justice Haines observed in *Cloud v. Canada (Attorney General)*, [2001] O.J. No. 4163 (Ont. S.C.J.), at para. 74:

> The limitations and laches defences also make these claims difficult, if not impossible to deal with in common. This action was commenced long past the prescription dates that would apply to the claims arising from the allegations of negligence.... To the extent any such claims may be saved by the discoverability rule, there will have to be an independent inquiry conducted of each member of the class to determine if they took action within a reasonable time once they were aware of the harm and its likely cause.

23 Again, such defences can only be resolved through an individual examination of each person's particular circumstances. Indeed, the plaintiff concedes that this is so.

24 It is clear that if this action was certified as a class proceeding it would quickly break down into an individual assessment of each proposed class member's particular circumstances. As Chief Justice McLachlin said in *Rumley v. British Columbia*, *supra*, at para. 29:

> There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, *supra*, at para. 39, the guiding question should be the practical one of 'whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis'. It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

25 Here it is not so much that the common issues are stated in overly broad terms. Rather, the problem in this case is created by the fact that, whatever common issues can properly be stated, they cannot be determined absent a prior examination of all of the individual inquiries. If this action were to be certified as a class proceeding on the basis of the common issues proposed by the plaintiff, it would be equivalent to putting the cart before the horse. The court would be asked to determine both vicarious liability and systemic negligence either in a factual vacuum or an individual examination of each claim would have to be undertaken which defeats the very purpose of a class action.

26 The common issues requirement is therefore not met.

D. Preferable procedure

27 The overall approach to this requirement must be guided by the three accepted goals of a class proceeding: judicial economy, access to justice and behaviour modification.

28 If the issues raised by this action could be dealt with on a common basis, then the goal of judicial economy could be accomplished by certifying this action as a class proceeding. However, as I have said above, it cannot be dealt with on that basis.

29 In terms of access to justice, there is no evidence before me that any of the members of the proposed class are not able to pursue their claims on an individual basis. There is a suggestion that some members of the class are unwilling to pursue individual actions because they do not wish to reveal their identities to the defendants. In my view, that is not a proper basis on which to certify a class proceeding. Class actions should not be used for the purpose of cloaking members of the plaintiff class with anonymity. It is also not a practical objective. At some point, all members of the class are going to have to identify themselves because they will have to prove their individual claim to damages. Whatever concerns there are by putative class members with respect to revealing themselves to the defendants appear to arise irrespective of the mode of proceeding utilized.

30 The basic claims here, while serious, are not particularly complex. They involve each claimant getting into the witness box and giving evidence as to what happened to them. There would not appear to be any appreciable documentary evidence that would attach to the plaintiff's claims, at least with respect to the liability issues. In addition, the vast majority, if not all, of these claims in terms of quantum of damages would likely fall either within the jurisdiction of the Small Claims Court or under the simplified rules procedure established by Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Both of these options are designed to make the determination of claims expeditious and inexpensive. Given these facts, the prosecution of each individual claim would not appear to be a costly proposition. Certainly, there is no evidence before me to the contrary. It would appear, therefore, that the members of the proposed class have a viable alternative way of pursuing their claims if they wish to do so. The denial of certification is not, consequently, a denial of access to justice.

31 Finally, on the issue of behaviour modification, I accept that that objective would be satisfied by a class proceeding. The failure of employers to supervise the activities of their employees in respect of the type of allegations made here clearly raise very serious concerns. However, that objective, by itself, cannot justify certification.

32 I have on other occasions remarked that the requirement of preferable procedure is very much bound up with the requirement of common issues. At the risk of repeating myself, if this were a situation where the principal claims of the proposed class members could be dealt with on a common basis, then I would be satisfied that a class proceeding would be the preferable procedure for so doing. For the reaons I set out when dealing with the common issues requirement, that is not this case, however.

E. Representative Plaintiff

33 There are three separate considerations in section 5(1)(e) of the Act under this final requirement for certification. It must be demonstrated that the representative plaintiff (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of the other class members.

34 The defendants' challenge the representative plaintiff's ability to fund the prosecution of this action if it is certified as a class proceeding. They contend that there is no evidence before the court that the representative plaintiff has the necessary funding in place to finance the litigation.

35 I have earlier held that the court must be satisfied as to the financial ability of the representative plaintiff to bear the expense that is necessarily involved for the proper prosecution of a class action — see *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Ont. S.C.J.) at para. 140. There is no evidence from the plaintiff on this point. There is no evidence regarding her financial resources to fund this litigation nor is there evidence of any other arrangements which have been made to cover the expenses associated with the litigation if it moves forward as a class proceeding. The absence of such evidence leaves the court without an essential element necessary to conclude that the proposed representative plaintiff would fairly and adequately represent the interests of the class. While I could adjourn the motion to permit such evidence

to be filed, because of the other problems I have found with this action being certified as a class proceeding, I decline to follow that route.

36 On the second consideration, the defendants raise various objections to the litigation plan. Some of the objections, I must say, are fairly vague in their terms and others are ones that could be addressed at a later date. The fact is that the representative plaintiff has set out a reasonably detailed and workable plan for the conduct of the litigation. There is one issue raised by the defendants, however, that is problematic with respect to the litigation plan. The plaintiff proposes that referees will be appointed to deal with the assessment of the damages of the class members and to determine "any other individual issues (including whether a claimant falls within the class definition)". Even assuming for the moment that the individual issues could be dealt with after the common issues (and I have already made it clear that they cannot), it would be inappropriate to have appointed referees determine such issues. In this case, the individual issues raise significant matters. Their determination cannot be delegated to another party. While again I could adjourn the motion to permit the plaintiff to amend the litigation plan, I am not inclined to do so. The litigation plan is an essential element of the certification process and ought to be adequately addressed in the first instance. In this case, the flaw that has been identified in the litigation plan is fundamental and one which would, by itself, be a sufficient reason to deny certification.

37 On the third consideration, the defendants assert that Ms. Fehringer may have a conflict with other class members because of her particular factual situation including that she did not receive any treatment of the type for which damages are sought in this proceeding. The fact of the matter is that in most class proceedings the damages to which individual class members are entitled are likely going to vary greatly. I am not satisfied that that is a sufficient reason to find that a representative plaintiff may be in a conflict with other class members. What is potentially problematic is that this representative plaintiff may, because of her specific dealings with Mr. Betts and her conduct thereafter, have a weaker claim on the merits than other class members might have. This fact could put her in conflict with other members in terms of the conduct of the litigation. I do not have to resolve whether that possible conflict should itself result in the denial of certification because of the conclusion I have reached regarding the common issues. It does serve to highlight, however, the very individualistic nature of the claims of the proposed class members.

Conclusion

38 I am not satisfied that the plaintiffs have established that the resolution of the common issues will sufficiently advance the litigation or, indeed, that their resolution is even possible without first determining the individual facts surrounding each claim. The motion for certification is therefore dismissed.

39 If the parties cannot resolve the issue of costs, they may make written submissions on the appropriate disposition. The defendants' submissions are to be filed within 10 days of the release of these reasons and the plaintiff's response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave. The submissions should include the necessary bill of costs or equivalent information that will allow me to fix the costs of the motion should I decide that costs are to be awarded. That material shall include, among other things, a proper bill of costs or equivalent together with time summaries or actual time entries and receipts for all disbursements claimed.

Motion dismissed.

Footnotes

1 see *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.).

2003 CarswellOnt 3841
Ontario Superior Court of Justice (Divisional Court)

Fehringer v. Sun Media Corp.

2003 CarswellOnt 3841, [2003] O.J. No. 3918, 125 A.C.W.S. (3d) 954, 39 C.P.C. (5th) 151

VANESSA FEHRINGER (Plaintiff / Appellant) and SUN MEDIA CORPORATION, SUN MEDIA (TORONTO) CORPORATION and TORONTO SUN PUBLISHING CORPORATION, carrying on business as THE TORONTO SUN and NORM BETTS, also known as NORMAN BETTS (Defendants / Respondents)

McRae, Dunnet, Jennings JJ.

Heard: September 30, 2003
Judgment: September 30, 2003
Docket: 718/02

Proceedings: affirming *Fehringer v. Sun Media Corp.* (2002), 2002 CarswellOnt 3569, 27 C.P.C. (5th) 155 (Ont. S.C.J.)

Counsel: Raymond G. Colautti, Jeffrey Raphael for Plaintiff / Appellant
Paul Tushinski for Sun Media Respondents
Lois B. Roberts for Respondent, Norman Betts

***Jennings J.* (orally):**

1 The appellant appeals from a decision refusing certification of her action as a class proceeding. The appellant alleged that she was one of a large number of women who, between 1971 and 2000 wanting to have their photographs published in the respondent's newspaper, were coerced into posing nude or topless and subjected to inappropriate comments, suggestions and other conduct.

2 The motions Judge correctly identified and discussed the criteria for certification required by s.5(1) of the *Class Proceedings Act, 1992*. Although he found problematic the proposed class definition and that an appropriate alternative procedure for expeditious and inexpensive resolution was to be found either in the Small Claims Court or under the Rule 76 Simplified Procedures, his primary concern was whether there were common issues.

3 He asked himself the appropriate question: whether the resolution of common issues would move the litigation forward to a sufficient degree so as to justify certification. He stated in paragraphs 16 and 17 of his reasons in part:

> "My concern is that it is virtually impossible to embark on a trial of the common issues until the facts which form the basis for all the individual claims have been presented. Put another way, it is simply not possible to make a blanket determination of the liability of any of the defendants without first engaging in an individual examination of the specific events which underlie each member's claim."

He concluded in paragraph 24 of his judgment:

> "It is clear that if this action was certified . . . it would quickly break down into an individual assessment of each proposed class member's particular circumstances."

4 We are of the view that the motions Judge did not apply a predominance test as argued by the appellant nor did he err in principle by distinguishing *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.). where McLachlin

C.J.C. held at p. 31, that there is no dispute that abuse occurred at the school and the central issue was whether the school should have prevented the abuse or responded to it differently.

5 Although the appellant submitted that the motions Judge erred in considering the limitation period issue, we agree that the allegations in the statement of claim gave rise to those issues.

6 Accordingly, we see no error in his findings that the common issues requirement was not met. We also agree with the findings and conclusion of the motions Judge on the issue of preferable procedure and representative plaintiff.

7 Although not necessary for our conclusion we are mindful of the comments of MacPherson J. in *Carom v. Bre-X Minerals Ltd.*, [2000] O.J. No. 4014 (Ont. C.A.) at paragraph 36, regarding deference due to Superior Court Judges who have developed expertise in the new and sophisticated area of class actions. The appeal on the merits is dismissed.

8 The award of costs was entirely within the discretion of the motions Judge. It has not been demonstrated that he exercised that discretion improperly. Indeed a strong argument can be made that in fixing costs at the levels that he did, he exercised his discretion in favour of the appellant. Leave to appeal the order as to costs is granted and the appeal therefrom is dismissed.

MCRAE J. :

9 The appeal is dismissed for oral reasons delivered by Jennings J. Costs on the appeal to the respondents fixed at $5,000 to each respondent including disbursements and GST.

Appeal dismissed.

2006 CarswellOnt 7317
Ontario Superior Court of Justice

Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée

2006 CarswellOnt 7317, [2006] O.J. No. 4625, 153 A.C.W.S. (3d) 30, 35 C.P.C. (6th) 264

Maurice Poulin, Plaintiff and Ford Motor Company of Canada Limited / Ford Du Canada Limitée, Ford Motor Company, Magna Donnelly Corporation (Magna-Donnelly), and Intier Automotive Closures, Inc. (Intier), Defendants

Mackenzie J.

Heard: June 27-29, 2006
Judgment: November 14, 2006
Docket: 3428/04

Counsel: Mr. G. Will, Mr. P. Miller, Mr. C. Morrison for Plaintiff
Mr. J.A. Hodgson, Mr. J. Squire for Defendants, Ford Motor Company of Canada Ltd., Ford Motor Company
Mr. R. Armstrong, Ms D. Fuller, Mr. M.D. Brown, Ms. A. Kuntz for Magna Donnelly Corporation, Intier Automotive Closures Inc.

***Mackenzie J.*:**

Introduction

1 The plaintiff moves for certification of this action as a class proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, (the *C.P.A.*).

2 The claims in the action arise out of allegedly defective springs in the door latch mechanisms of certain motor vehicles manufactured by the defendant, Ford Motor Company of Canada Limited and Ford Motor Company ("Ford"). The defendants Magna Donnelly Corporation and Intier Automotive Closures Inc. manufactured the door latch mechanisms of which the allegedly defective springs are a component. The plaintiff alleges that the defective springs in the door latch mechanisms affect approximately 317,215 vehicles sold and delivered in Canada ("the Affected Vehicles") and that the cost of repairing the allegedly defective springs is approximately $2,000.00 for a vehicle having four doors, and approximately $1,000.00 for a vehicle having two doors.

3 The gist of the plaintiff's claim is that the allegedly defective springs in the door latch mechanisms for the Affected Vehicles failed to meet the minimum standards prescribed by the regulators both in Canada and the United States in terms of withstanding forces that would cause the door latch mechanism to remain in place and the door in question to remain closed in the event of rollover accidents or a side impact collision with other vehicles. It is claimed that this failure of the door latch mechanism is a latent defect and renders the Affected Vehicles inherently dangerous to the occupants or passengers in the Affected Vehicles.

4 The plaintiff alleges that the defendants have been negligent in their production, design, and manufacture of the allegedly defective spring and the door latch mechanisms for the affected vehicles and are in breach of implied warranty of fitness for the purpose sold under the *Sale of Goods Act*, R.S.O. 1990, c. S.1, as amended, and in breach of their obligations under the *Business Practices Act*, R.S.O. 1990, c. B.118, as amended [repealed by S.O. 2002, c.30, Sched. E., S.1, eff. July 30, 2005].

5 The plaintiff submits that the action satisfied the requirements under the *C.P.A.* for certification as a class proceeding and an order should issue accordingly.

Background

6 The following Affected Vehicles were manufactured by Ford between November 1995 and April, 2000:

(1) Ford F-150 pickup trucks, model years 1997-2000;

(2) Ford F-150 four door, crew cab pickup trucks, model year 2001;

(3) Ford Expedition, model years 1997-2000;

(4) Ford Lincoln Navigator, model years 1998-2000.

7 In March of 1998, the plaintiff purchased a used 1997 Ford F-150 from a motor vehicle dealer in Sudbury region where he resides. At the time of his purchase, the vehicle had an odometer reading of just under 41,000 kilometres. The plaintiff drove his vehicle over a period of six years from the date of his purchase without incident, logging approximately 160,000 kilometres. At no time during that period was he aware of any safety concerns in the vehicle arising from the allegedly defective door latch mechanism.

8 In the summer of 2004, the plaintiff received a telephone call from a person in a law firm in Sudbury inquiring as to whether or not he owned a 1997 F-150 pickup truck. This person informed the plaintiff that the door handles on that vehicle could be defective and that he would be receiving further information on the issue.

9 In June or July 2004, a representative of plaintiff's counsel contacted the plaintiff and made arrangements for him to drive his vehicle to a branch office of counsel in the Huntsville area. He complied with this request on the 22 of June 2004 and under the direction of counsel, his vehicle was inspected. In August of 2004, this action was commenced by a statement of claim against the present defendants and others. This statement of claim was amended on October 29, 2004, essentially discontinuing the action against all but the present defendants.

10 The plaintiff on behalf of the class as well as for himself seeks, among other things, damages sufficient cover the costs of repair of the allegedly defective door latch mechanism for the Affected Vehicles. As noted above, these costs are approximately $2,000.00 for a four-door vehicle and $1,000.00 for a two-door vehicle. In addition, the plaintiff seeks punitive and exemplary damages in the amount of $527,000,000.00 or in the alternative, an amount which would be not less than the money the defendants saved by failing to replace the allegedly defective door latch mechanisms when they first became aware of the defect. The basis for the claim for the punitive and exemplary damages is the plaintiff's allegation that the defendants were aware of the allegedly defective door latch mechanism but willfully failed to inform the appropriate regulators of such defects at any material time.

Issue

11 Has the representative plaintiff discharged his onus of establishing that the requirements for certification of the action as a class proceeding under s. 5 of the *C.P.A.* have been met?

Analysis

Preliminary Considerations

12 In assessing the evidentiary record and submissions of the parties on a certification motion, the goals and objectives of the *CPA* drive the analysis. These are:

(1) More efficient judicial economy;

(2) Improved access to justice;

(3) Behaviour modification

(See *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), para. 27-29 for detailed discussion of the goals).

13 The tests for certification of a class proceeding under the *CPA* are set out in section 5:

Section 5 (1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for resolution of the common issues;

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

(iii) does not have, on the common issues for the class, an interest in conflict with the interest of other class members.

14 Before turning to the evidence, I note the *C.P.A.* is a procedural statute only. Accordingly, on a certification motion the court makes no decision on the merits of the action. In other words, at certification the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims in the action can appropriately be prosecuted as a class proceeding: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.), para. 16, at p. 320.

15 The evidence on this certification motion consists of the following materials:

On behalf of the plaintiff:

(1) an affidavit by F. Jekel, an American attorney, whose law firm has acted for plaintiffs in U.S. actions based on the same facts as this action.

(2) Transcripts of cross-examination of defendants' affiants, T. Williams, D. Schafer, P. Taylor)

(3) Affidavit by J. Young.

On behalf of the defendants:

(4) the transcript of examination of the plaintiff under Rule 39 (no affidavit was filed by the plaintiff).

(5) Affidavits by R. Tait and D. Turnbull, on behalf of the Magna defendants.

(6) Affidavits by T. Williams and P. Taylor on behalf of Ford.

(7) the transcripts of the cross-examination of the affiant, J. Young, on behalf of plaintiff and of the cross-examination of affiants, Taylor, Schafer, Tait.

16 Before applying the criteria in s. 5(1) of the *C.P.A.* to the evidentiary record, it bears repeating that the focus at the certification stage is on procedure rather than on the merits. In this motion, there has been a considerable amount of affidavit materials and extensive cross-examination on such materials from affiants who would likely be put forward as expert witnesses at trial. However, at the motion for certification, the evidence of experts can only be relevant to issues of certification under s. 5(1) of the *C.P.A*. Accordingly, unless the expert evidence has relevance to any factors in s. 5(1) of the *C.P.A.*, it will have no bearing on the disposition of the certification motion.

17 In addressing the requirement that the pleadings disclose a cause of action, the test therein is the same as the test on a motion to strike a pleading under Rule 21 of the *Rules of Civil Procedure*. In *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), the Supreme Court of Canada put the test in the following words: "Assuming that the facts pleaded could be proved, is it plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action." This statement of the test is amplified by the following:

> As in *England* [case name], if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length nor complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. (para. 33)

The pleadings disclose a cause of action requirement: Section 5(1)(a)

18 As noted above, the plaintiff asserts several causes of action in his amended statement of claim. These are: negligence in the production, design and manufacture of the subject door latch mechanism; breach of the warranty of fitness; breach of an "implied warranty" that the Affected Vehicles sold to the plaintiff and other members of the putative class were safe for the intended purpose and use of such vehicles: (para. 44, Statement of Claim), breach of collateral warranties that the vehicles were safe for their intended purposes by affixing certificates of fitness to the vehicles to the effect that the vehicles in question conformed with all safety standards, including both the Canadian and American standards relating to door latch mechanism operation; and: breach of the *Business Practices Act*, R.S.O. 1990, Ch. B-118, by making a representation to the plaintiff and other members of the putative class that the door latch mechanisms of the Affected Vehicles operated safely when the defendants knew that they did not operate safely: (paras. 49 and 50, amended Statement of Claim).

The Breach of Warranties cause of action

19 The alleged cause of action based on breach of warranties, whether implied or collateral, may be readily disposed of.

20 The "collateral warranty" as to quality and fitness of the affected vehicles essentially refers to the implied warranty as to the fitness of goods sold pursuant to s. 15 of the *Sale of Goods Act*. The implied warranty under s. 15 of the *Sale of Goods Act* is engaged where goods are delivered under a contract of sale. It is beyond dispute that the plaintiff or any members of the putative class did not purchase an Affected Vehicle from either of the Ford defendants or the Magna defendants. In fact, it is acknowledged that the plaintiff purchased his vehicle as a secondhand vehicle from a motor vehicle dealer. In such event, none of the defendants are "sellers" as defined under the *Sale of Goods Act* and accordingly, they are not parties to any "contract of sale" under which any of the Affected Vehicles were delivered to or obtained by any member of the putative class. In the result, the so-called "collateral" warranty described by the plaintiff in its amended statement of claim creates no tenable cause of action against the defendants or any of them.

The Contravention of the Business Practices Act cause of action

21 I turn now to the cause of action based on the alleged breach by the defendants of the *Business Practices Act*.

22 The essence of the plaintiff's position here is that Ford "made it known to the plaintiffs and the class that the Affected Vehicles were reasonably fit for the use for which it was intended and that the Affected Vehicles were of merchantable quality": see para. 48, Amended Statement of Claim). The plaintiff also pleads that Ford sold the Affected Vehicles making representations that the subject vehicles were of a certain quality when they knew or ought to have known that they were defective by virtue of the allegedly defective door latch mechanisms: see para. 49 and 50 Amended Statement of Claim.

23 Ford responds that the plaintiff is not entitled to any remedy under the *Business Practices Act*. In this regard, Ford contends there is no pleading by the plaintiff that he was induced to enter into any agreement by any representation made by Ford, pointing out that:

> (a) the only agreement of purchase and sale entered into by the plaintiff was with a motor vehicle dealer; and
>
> (b) that the plaintiff has not pleaded any particular representation or statement on which the plaintiff relied or was likely to rely to his detriment.

On the last-mentioned point, Ford submits that the sticker or "National Safety Mark" affixed to the Affected Vehicles is not a "promise" or a "guarantee" by the manufacturer of the vehicle that the vehicles in question is safe.

24 Ford refers to the *Motor Vehicle Safety Act*, S.C. 1993, S.C. 1993, c.16, which regulates the manufacture of motor vehicles and motor vehicle equipment in Canada. This *Act* and the regulations thereunder do not describe the National Safety Mark stickers as constituting a promise or guarantee to any consumer. In any event, Ford submits that the plaintiff has not pleaded he relied on any alleged promise or guarantee contained in the National Safety Mark sticker in his purchase from the motor vehicle dealer.

25 To be within the ambit of the *Business Practices Act*, a representation is defined as follows:

> "Consumer representation" means a representation, statement, offer, request or proposal,
>
> > (a) made, respecting or with a view to the supplying of goods or services, or both, to a consumer, or
> >
> > (b) [not relevant]
>
> [emphasis added]

Ford submits the word "made" in sub-clause (a), having regard to the entire scheme of the *Business Practices Act*, indicates that the representation, statement, etc. must be express and not implicit. As noted, the plaintiff has not proffered any evidence that he relied in his purchase of his vehicle on any implied representation arising out of the National Safety Mark sticker in purchasing his vehicle.

26 I accept these submissions. In the result, I conclude the plaintiff has no reasonable cause of action based on a contravention of the *Business Practices Act*.

The Negligence cause of action

27 I turn now to the plaintiff's position that he has a reasonable cause of action against the defendants based in negligence.

28 The plaintiff contends that he and other members of the putative class seek damages in negligence for economic loss respecting the anticipated costs of repairs of the allegedly defective door latch mechanism.

29 There is no issue that damage is an essential element of a claim in negligence and that the costs of repair of dangerous defects can properly be asserted in negligence actions.

30 The plaintiff relies on the decision of the Supreme Court of Canada in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.), which creates an exception to the general prohibition against damage awards for pure economic loss in negligence actions. The plaintiff contends that the claims herein for anticipated repair and/or replacement costs for the allegedly defective door latch mechanism fall within the exception described in *Winnipeg Condominium*.

31 In *Winnipeg Condominium*, a large section of exterior cladding fell from the ninth story of the plaintiff's building. The plaintiff had all the cladding on the building removed and replaced. As the plaintiff was not the original owner of the building and thus had no contractual relationships with either the architect or the contractors for the building, it brought an action in negligence against them to recover repair costs. The Supreme Court held, among other things the following:

> Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the reasonable costs for repairing the defects and putting the building back into a non-dangerous state. (para. 43)
>
> and:
>
> ...any danger of indeterminacy of damages is averted by the requirement that the defect which the costs of repair are claimed must constitute real and substantial danger to the inhabitants of the building ...
>
> [Emphasis added] (para. 49)

32 Ford argues that the failure of the plaintiff to repair the allegedly defective door latch mechanism is almost conclusive evidence that there is no "real and substantial danger" within the meaning of the above *Winnipeg Condominium* dicta; accordingly, this case does not fit within the parameters for the pure economic loss exception noted above. In support of this position, the defendants argue that the plaintiff's case is readily distinguishable from the facts in *Winnipeg Condominium*, pointing out that the plaintiff there had already spent approximately $1.5 million to remedy the defective cladding whereas in the present case, the plaintiff and members of the putative class have incurred no repair costs at all.

33 Both the plaintiff and the Magna defendants refer to *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (Ont. C.A.). In *Hughes*, the plaintiff sought certification of an action claiming negligence for pure economic loss relating to an allegedly dangerous product, namely, a smoke detector. The plaintiff sought a refund of the purchase price of his allegedly defective smoke detector but not damages for the costs of a replacement smoke detector. The Court of Appeal held the plaintiff's claim for pure economic loss based on the allegedly defective and dangerous smoke detector could survive the defendant's Rule 21 motion to strike the Statement of Claim (the "plain and obvious" test). However, the court expressed reservations as to the possible success of the plaintiff's claim for a refund as opposed to repair costs.

34 Although the Court of Appeal was dealing with an appeal from the defendant's motion under Rule 21 to strike the claim and not a certification order, the decision is instructive in the present case in dealing with the exception to the general prohibition in negligence actions against damages for pure economic loss.

35 The plaintiff's claim was for damages equalling a refund of the purchase price of the allegedly defective smoke detector, not the costs of removing and installing a replacement smoke detector. As in the present case, the plaintiff had not incurred any expense in relation to the defective smoke detectors but unlike the present case, rather than seeking damages for the repairs or remedial action in relation to the defective smoke detectors, the plaintiff was seeking a refund of the purchase price, plus costs of removing them *and* obtaining a replacement.

36 In *Hughes*, Laskin, J.A. for the court, described safety, i.e. the prevention of threatened harm, as the rationale permitting recovery in pure economic loss situations. The following observations are pertinent in the present case:

> [26] ...By compensating the owner of a dangerously defective product for the cost of repair, the law can encourage the owner to make the product safe before it causes injury to persons or property. By contrast, compensation to repair a defective but not dangerous product will improve the product's quality but not its safety.
>
> [27] This case falls on the border. *A smoke detector that does not detect fires in time for occupants to escape injury is not itself dangerous, but relying on it is. The occupants are lulled into a false sense of security. The threatened harm to persons or property is no less than that from a dangerous defect*. In other words, the safety considerations are similar. Safety justified compensating the owner of the apartment building in *Winnipeg Condominium Corp. No. 36* to eliminate the dangerously defective cladding. Safety may also justify compensating the owner of a defective smoke alarm to eliminate dangerous reliance on it.
>
> (emphasis added)
>
> . . .
>
> [29] For these reasons, I am not persuaded that *Hughes* negligence claim against *First Alert* discloses no reasonable cause of action. *As a supplier of allegedly defective safety devices on which reliance is dangerous, First Alert may well owe a duty of care to a purchaser that is not defeated by the relevant policy considerations. This claim should not fail on a rule 21.01(1)(b) motion*. Before deciding whether *First Alert* owes a duty of care to compensate *Hughes* for purely economic losses, the court should have an evidentiary record.
>
> (emphasis added)

37 The above dicta arise from a decision on appeal from a motion to strike under Rule 21 where the court decided the defendant seeking to strike had not discharged its onus in establishing that it was "plain and obvious" that the plaintiff's claim could not succeed. However, the dicta are useful here in deciding whether the allegedly defective door latch mechanism can, on the evidentiary record, fall within the *Winnipeg Condominium* exception as a dangerous device. If the words "smoke detector" in para. 27 are deleted and the words "A door latch mechanism" are substituted in the highlighted sentence (with appropriate changes), the sentence reads as follows:

> *A door latch mechanism* that does not [meet prescribed standards for securing doors on vehicles closed so as to enable occupants] to escape injury is not in itself dangerous, but relying on it is. The occupants are lulled into a false sense of security. The threatened harm to persons or property is no less than that from a dangerous defect.

38 I turn now to the evidentiary record. The focus in the certification motion is on procedural aspects rather than the merits of the claims. The evidence, particularly of the experts, relating to the allegedly defective door latch mechanism is focused on the merits.

39 The question arises whether expert evidence is admissible to determine whether the plaintiff has established a reasonable cause of action. I am persuaded that expert evidence relating to the merits of the claims is not admissible with respect to the requirement of establishing a reasonable cause of action, in accordance with s. 5(1)(a) of the *C.P.A.*: see *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Ont. Gen. Div.) at p. 320. However, for purposes of the certification motion, there is evidence other than the opinion evidence as to the allegedly defective door latch mechanism. This evidence consists in the main of U.S. personal injury cases involving accidents in which doors on the Affected Vehicles have opened, causing injuries to the occupants. This evidence is by no means dispositive of the plaintiff's allegations respecting the door latch mechanism; such disposition will be the subject of the trial, at which time the opinion evidence of the experts will be admitted and weighed. At the certification stage, however, it cannot be said that it is plain and obvious that the plaintiff's claims do not disclose a reasonable cause of action.

40 In the result, I am not satisfied that the plaintiff's cause of action in negligence for pure economic loss within the exception set out in *Winnipeg Condominium* discloses no reasonable cause of action. Accordingly, I conclude the plaintiff has met the requirement in s. 5(1) (a).

The Identifiable Class requirement, s. 5(1)(b)

41 The onus on a plaintiff for this requirement has been described in *Hollick*, as follows:

> The representative [plaintiff] need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be a showing, however, that the classes not necessarily brought - that is that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: para. 21.

42 However, there must be a rational collection between the class and the proposed common issues although it is not necessary that all claims of class members raise the same common issue as any differences may be accommodated through the creation of sub-classes.

43 The purpose of the requirement of a "identifiable class" per s. 5(1)(b), *C.P.A.* is as follows:

> (a) it identifies the persons who have a potential claim for relief against the defendant;
>
> (b) it defines the parameters of the lawsuits so as to identify those persons who are bound by its result; and
>
> (c) it describes who is entitled to notice pursuant to the *C.P.A.*: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) para. 38 and *Caputo* above, at para. 38.

44 The plaintiff brings the proceeding on behalf of all individuals or corporations who purchased or leased any of the Affected Vehicles in Canada from November 1995 to April 2000.

45 According to the plaintiff, the allegedly defective door latch mechanism is to be found in approximately 317,000 vehicles sold or leased in the period from November 1995 through April 2000.

46 The plaintiff submits that the most efficient way of ascertaining the members of the class would be through the records of either Ford or having them access current ownership lists for the Affected Vehicles by way of agreement with the Canadian Counsel [sic] of Motor Transport Administrator. The plaintiff further contends that this mode of identification can be determined objectively without any reference to the merits of the case and it would identify unequivocally the persons to whom notice of this proceeding should be provided and who would be bound by the disposition of the case.

47 Ford submits the plaintiff has proffered two proposed class definitions, the one referred to above as well as a second definition, being "all of those individuals or corporate entities who seek damages for the actual cost to repair the defective door latch mechanism for all of the [Affected Vehicles] in Canada, as well as damages for punitive and exemplary damages for not less than the actual sum of money saved by the defendants by failing to repair the door latch assembly".

48 Ford contends these two class definitions are inconsistent in that the one definition would include all current owners of the Affected Vehicles in Canada and the other definition would include anyone who had previously purchased one of the Affected Vehicles regardless of whether such person might in the interval have sold such vehicle and regardless of whether they have repaired the alleged defective door latch mechanism.

49 As well, Ford submits the plaintiff's suggestion of an efficient way of ascertaining any members of the proposed class is flawed. Notwithstanding that Ford may have manufactured and delivered the Affected Vehicles into the Canadian market for the 1997 and 2000 model years, Ford would not have any knowledge of who are current owners of the Affected Vehicles in Canada and is unable to obtain names and addresses of those current owners unless notice of safety defects are issued pursuant to s. 10 of the *Motor Vehicle Safety Act*.

50 The Magna defendants adopt the submissions of Ford in this regard.

51 In his reply factum, the plaintiff clarifies its proposed class definition by stating it includes "all persons and/or corporate entities who own or lease any of the [Affected Vehicles] that were manufactured during the period of November 1, 1995 to April 2000". The plaintiff expressly excludes from this definition any individuals or corporate entities that previously owned or leased any of the Affected Vehicles. The plaintiff in his reply submissions, whether by way of factum or oral argument, did not address the practical concerns and difficulties raised by the defendants in obtaining an accurate record of current owners and lessees of the Affected Vehicles.

52 Applying the above principles to the proposed class definition, I am satisfied that the criteria for class membership inherent in the proposed class definition are objective in nature and not subjective or "merit-based". The proposed definition does not include those who have suffered loss or damage as a result of the defendants' conduct. It simply describes the members of the class as purchasers or lessees of an Affected Vehicle in Canada during the period in question. The difficulties in distinguishing merit-based definitions of class membership from the objective criteria thoroughly canvassed by Collity J. in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (Ont. S.C.J.) do not arise in this certification motion.

53 Nonetheless, in my view the difficulties submitted by Ford in obtaining accurate identification of the class members are susceptible of procedural resolution and do not constitute a viable substantive objection to the proposed class definition. I accordingly find that the plaintiff has met the requirement of an identifiable class under s. 5(1)(b).

The Common Issues requirement, s.5(1)(c)

54 I turn now to the requirement of common issues under s. 5(1)(c) of the *C.P.A.*

55 The term "common issues" for purposes of s. 5(1)(c) is defined in s. 1 of the *C.P.*A. as follows:

> "Common issues" means,
>
> a) common but not necessarily identical issues of fact, or
>
> b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

56 In *Hollick*, the court enunciated the meaning to be ascribed to the adjective "common" in the term "common issues" under s. 5(1)(c):

> A more difficult question is whether the 'claims ... of the class members raise common issues' as required by s. 5(1)(c) of the *Class Proceedings Act*, 1992. As I wrote in *Western Canadian Shopping Centres Inc.*, the underlying question is 'whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis'. Thus an issue will be common "only where its resolution is necessary to the resolution of each member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial...ingredient" of each of the class members' claims." (para. 18);

and the court noted the common issues must be of such nature that their resolution will "significantly advance the action" (para. 32).

57 The meaning to be attributed to the concept of the common issues "advancing the litigation" can be gleaned from the following dicta which dealt with the preferable procedure requirement in s. 5(1)(c):

> The question on the motion for certification is not simply whether there are common issues raised by the claims advanced. Any proposed class action that has any chance of being certified will, virtually by definition, have common issues. Rather, the issue is whether the resolution of the proposed common issues is going to move the litigation forward to a sufficient degree so as to justify certification of the action as a class proceeding. An important consideration in this regard is whether any individual issues that will remain for determination after the common issues are resolved are limited or whether what remains to be determined as sufficiently extensive that the determination of the common issues essentially marks the commencement, as opposed to the completion, of the liability inquiry: *per* Nordheimer J. in *Moyes v. Fortune Financial Corp*. (2002), 61 O.R. (3d) 770 at pp. 779-80; see also *Western Canadian Shopping Centres Inc.*, *supra*, para. 39; and *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453, at paras. 134, 135 (Div. Ct.).
>
> (emphasis added)

58 I turn now to the plaintiff's common issues. These are:

(1) whether the defendants owe a duty of care to the class members; and whether they breached that duty of care;

(2) whether the springs in the outside door handles utilized in the Affected Vehicles are defective and unreasonably safe;

(3) whether the Crash Pulse Test can be utilized for compliance for the Affected Vehicles manufactured prior to September 1, 2997;

(4) whether the Crash Pulse Test method is equivalent to the SAE J839 calculation for the purpose of the CMBSS 206;

(5) whether a violation of the requirement to meet 30 G's [sic] renders the Affected Vehicles unsafe;

(6) whether the outside door handle springs were designed or manufactured to keep doors closed on impact;

(7) whether the defendants failed to give adequate warnings regarding the defects and limitations of the Affected Vehicles;

(8) whether the Affected Vehicles breached their collateral warranties as to fitness and safety and are fit for their ordinary and intended use;

(9) whether the plaintiffs and the members of the class are entitled to compensatory damages and, if so, the nature and amount of such damages;

(10) whether the members of the class are entitled to punitive and exemplary damages and, if so, the quantum of such damages.

59 The plaintiff submits the proposed common issues relate to issues of negligence, breach of warranty, unfair practices and the determination of punitive damages which apply to each Affected Vehicle and thus the owner or lessee of any such vehicle. Counsel contends that a determination of these liability aspects will determine the liability issues for each class member, there being no individual issues of causation and the only variation in compensatory damages will be whether a members' Affected Vehicle is a two-door or four-door vehicle.

60 The plaintiff further submits that the issues of (a) whether the defendant's utilization of outside door handle springs in the Affected Vehicles were defective and reasonably unsafe; and (b) whether the defendants negligently or

intentionally allowed such springs to be installed in the affected vehicles when they knew or ought to have known they were unsafe, are not only common to every class member but are a substantial ingredient of each class member's claim. Accordingly, the resolution of these issues in a product liability case such as the present will advance the litigation in the manner previously described.

61 In response, the defendants take the position that the proposed common issues are not common within the meaning ascribed by the courts to the term "common issues". The most compelling argument for the defendants' position is based on the reasons in *Western Canadian Shopping Centres*, *supra*, and *Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488 (B.C. C.A.) and *Harrington v. Dow Corning Corp.* (2000), 193 D.L.R. (4th) 67 (B.C. C.A.), two decisions of the B.C. Court of Appeal.

62 The *Ernewein* case is of particular relevance to the present case on a factual plane. The gist of that plaintiff's claim in a proposed certification motion was that the defendant had negligently designed and manufactured certain trucks by positioning the gasoline tanks for such vehicles "outside the rails" of the frame of the truck. The contention was that this action constituted a latent defect of a dangerous nature involving the possibility of such fuel tanks being ruptured upon collision or other impact, thereby producing the risk of serious bodily injury or death to occupants of the vehicle arising from fire and potential explosion. As in the present case, the nature of the damages sought by the plaintiff on behalf of himself and proposed class members was a loss of value in the subject vehicles plus punitive damages, there being no damages for personal injury or damage to property.

63 The appeal court revised a certification order. The court stated that the ability to generalize or extrapolate from one plaintiff's vehicle to another is crucial to the existence of the common issue. The court relied on the defendant's evidence that because the subject vehicles had incorporated a number of unique fuel system designs, it was not possible to generalize on how such vehicles would perform in particular crashes beyond stating that all designs were reasonably safe and meet all applicable Federal safety standards.

64 The Magna defendants submit there are differences in the door latch mechanisms for the Affected Vehicles, in terms of manufacture and design. In addition, the evidence indicates that the variation in the manufacturing and design of the door latch systems necessitates individual investigation of alleged defects and, in the result, the findings with respect to a given vehicle within the Affected Vehicles cannot be extrapolated or generalized to other vehicles.

65 The plaintiff has contended it is the spring component of the door latch mechanism that is defective and that defective component is the basis for the alleged safety deficit and non-compliance with the prescribed standards.

66 The defendants respond that it is the effect of the allegedly defective spring in the operation of the door latch mechanism as a whole, which potentially gives rise to the alleged safety and non-compliance with standards concerns expressed by the plaintiff. The defendants have submitted evidence in support of the proposition that each door latch mechanism must be separately considered and analyzed even though some of the door latch mechanisms share some common components.

67 I deal now with each of the plaintiff's proposed common issues:

> (1) whether the defendants owe a duty of care to the class members and whether they have breached the duty of care;
>
> It is not contested by the defendants that they each owe a duty to owners and users of the vehicles containing the allegedly defective door latch mechanism.
>
> Accordingly, the resolution of that issue would not advance the litigation in the sense previously referred to.
>
> (2) whether the springs on the outside door handles utilized in the affected vehicles are defective and unreasonably unsafe.

The plaintiff has failed to establish on the evidentiary record that the different door latch mechanisms on the Affected Vehicles are of no consequence. Both the plaintiff and the defendants have put forward evidence in respect of their positions. In the circumstances, the issue framed above cannot be described or characterized as a common issue within the meaning of the case law. Accordingly, a resolution of this issue relating to the plaintiff's vehicle does not resolve the question of whether other Affected Vehicles having a different door latch mechanism have a defective or unsafe door latch mechanism.

(3) whether the Crash Pulse Test can be utilized for compliance for the affected vehicles manufactured prior to September 1, 1997;

(4) whether the Crash Pulse Test method is equivalent to the SAE J839 calculation for the purpose of the CMBSS206 [standard].

Ford submits that these two proposed common issues suggest that the standards of compliance under the *Motor Vehicle Safety Act* create a cause of action. Ford contends that "whether an automobile manufacturer is entitled to demonstrate compliance with the 20 G standard using any particular method does not, in itself, create a cause of action": Factum, para. 87. I accept this contention.

(5) whether a violation of the requirement to meet 30 G's [sic] renders the Affected Vehicles unsafe;

The onus is on the plaintiff to frame, as opposed to demonstrate, a rational connection between the members of the class on a proposed common issue and that the issue would be a substantial common ingredient of the claim for each member of the class. The plaintiff fails to discharge this onus since the required degree of clarity is absent in the word "utilized".

(6) whether the outside door handle springs were designed or manufactured to keep doors closed upon impact.

Ford and the Magna defendants contend that the design or manufacturer of an outside door handle spring is largely irrelevant as to whether the door latch mechanism *qua* system is unsafe. As the components of the door latch mechanism vary as between various brands within the Affected Vehicles and from year to year for those brands, the failure, if any, of the door latch mechanism in the plaintiff's vehicle to comply with the regulatory standard does not determine whether other class members whose brands have different door latch mechanisms also have an unsafe door latch mechanism. Accordingly, there is no substantial common ingredient among all members of the class in relation to this proposed common issue.

(7) whether the defendant's failed to give adequate warnings regarding the defects and limitations of the Affected Vehicles.

This is an individual issue: it assumes that the claimant has suffered a loss which might have been avoided if a warning had been given.

(8) whether the Affected Vehicles breached their collateral warranties as to fitness and safety and are fit for their ordinary intended use.

This is not a common issue arising from the pleadings. As previously noted, the defendants were not sellers of any of the Affected Vehicles for the purposes of the *Sales of Goods Act* nor is there any evidence that representations of the nature required under the *Business Practices Act* were made by the defendants or any of them to the plaintiff or any members of putative class.

(9) whether the plaintiffs and the members of the class are entitled to compensatory damages and, if so, the nature and amount of such damages.

> This issue presumes damages and causation which have not been pleaded in the amended statement of claim. On the evidentiary record, neither the plaintiff nor any member of the putative class has paid for the cost of repair of the allegedly defective door latch mechanisms. The plaintiff's "reasonable cause of action", arguably being within the pure economic loss exception (under the heading, "reasonable cause of action", above), does not assist the plaintiff in satisfying the common issues test, in the absence of pleading damages and causation.
>
> (10) whether the members of the class are entitled to punitive and exemplary damages and if so, the quantum of such damages.
>
> The allegations against both Ford and the Magna defendants are copiously set out in paragraphs 53 and 54, respectively, of the amended statement of claim. In summary, the plaintiff alleges that both Ford and the Magna defendants intentionally, having full knowledge of the safety problems in the alleged safety problems in the door latch mechanisms failed to comply with the Canadian and U.S. regulatory standard and kept information as to non-compliance from both the American and Canadian regulators.
>
> The claim of punitive and exemplary damages entitlement cannot stand alone as a common issue. Ford contends the plaintiff's claim for breach of collateral warranties arising in contract cannot lead to punitive damages without an independently actionable tort: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.) and *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257 (S.C.C.). The Magna defendants also challenge the proposed common issue as claims for punitive and exemplary damages as not being capable of standing alone as a common issue.
>
> I am persuaded that the proposed common issue requires an independently actionable tort in the face of these allegations in the amended statement of claim. Accordingly, I accept the contention that proposed common issue number 10 cannot stand alone as a common issue.

The Preferable Procedure requirement, s. 5(1)(d),

68 The preferability inquiry should be conducted through the lens of the three principles or advantages of class actions: judicial economy, access to justice and behaviour modification: ***Hollick***, *supra*, para. 27.

69 The term "preferable" is to be construed broadly and is meant to capture two ideas: first, the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim" and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures, such as joinder, test cases, consolidation and so on": see ***Hollick***, para. 28, adopting the extracts at p. 32 of the Report of the Attorney General's Advisory Committee on Class Action Reform, 1990. In determining whether a class proceeding is the preferable procedure in the sense of being a "fair, efficient and manageable method of advancing a claim", the Supreme Court in ***Hollick*** indicated it is impossible to determine such a question without looking at the common issues in their context: ***Hollick***, para. 28.

70 In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), the Ontario Court of Appeal reiterated the above dicta in ***Hollick*** and noted that the preferability requirement in s.5(1)(d) of the C.P.A. can be met even where there are substantial individual issues and that the drafters of the preferability requirement rejected a "requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure": para. 75, *per* Goudge, J.A. In summary, the court in dealing with the above dicta in ***Hollick*** stated that "the critical question is, whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action": para. 76.

71 The plaintiff submits that (1) the judicial economy objective is met having regard to the huge numbers of potential members of the putative class having their claims dealt with in a class proceeding as opposed to the same number of claimants having individual trials; (2) the access to justice objective is met since, in the absence of a class proceeding

representing individual claims for the costs of repair of the allegedly door latch mechanisms (estimated not to exceed $2,000 for a four door vehicle), any reasonable prospect of individual class members pursuing their claims in a regular trial is minimal, in light of the cost of litigation; and (3) the number of claims subsumed in a class proceeding and the value of such claims will cause the defendants to modify their behaviour by insuring they discharge their obligations to the public at large in manufacturing and delivering mass-produced motor vehicles.

72 The defendants take the position that even if the court determines that some of the proposed common issues are valid common issues, the class proceeding is not the preferable procedure. In this regard, the defendants content that the proposed class proceeding is "in effect, a request to this court to usurp the role of Transport Canada", *per* Ford factum, para. 97; and "essentially an attempt by plaintiff's counsel to use the civil courts to mandate a recall of the Ford vehicles based on alleged non-compliance with relevant automobile safety regulations", *per* Magna defendants' factum, para. 114.

73 Both the Ford and Magna defendants set out the regime under the *Motor Vehicle Safety Act* and *Regulations* whereunder Transport Canada, which is charged with the administration of the *Motor Vehicle Safety Act and Regulations*, can monitor motor vehicle manufacturers' compliance with the *MVSA* and *Regulations* through promotion and enforcement activity. The defendants acknowledged that there is no provision in the *Act* and Regulations for compensating the owners of motor vehicles who have non-compliance issues for any losses suffered by the owners. However, the defendants submit that enforcement proceedings by Transport Canada on complaints respecting the allegedly defective door latch mechanism by the plaintiff or any member of the putative class could result in a true "recall" of the affected vehicles. In this regard, it is contended that such an action would ensure that funds are spent on the actual repairs required rather than finding their way to class members and their counsel herein for purposes other than actual repairs.

74 The defendants further submit that the investigation of alleged non-compliance by the defendants can be conducted by Transport Canada more expeditiously and at less expense to the plaintiff and class members than through a complex and potentially drawn out class proceeding.

75 In reply, the plaintiff takes issue with the submission of Ford that the proposed class proceeding "usurps" the role of Transport Canada. In support, the plaintiff suggested the acceptance of this submission would entail that class proceedings in respect of conspiracies could not go forward because they usurp the role of the police; drug and medical device class proceedings could not go forward because they usurp the role of Health Canada; and securities class proceedings usurp the role of the Ontario Securities Commission; para. 92, plaintiff's reply factum. The plaintiff submits there is a danger in leaving the responsibility of compliance by manufacturers of motor vehicles to the regulator, i.e. Transport Canada. In this regard, the plaintiff relies on a U.S. and a British Columbia decision, the latter being *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (B.C. S.C.).

76 In *Reid*, the plaintiff on a certification motion alleged that certain vehicles manufactured by the defendant were equipped with defective parts that caused the vehicle to stall without warning. The plaintiff, in dealing with the preferable procedure requirement under the British Columbia legislation, submitted that because the cost of replacing the parts was small compared to the cost of litigation, the only practical means of proving the allegations was in a class proceeding. In dealing with the availability of other methods of resolving the claims, the court made the following observations:

> "There is evidence that complaints have been made to Transport Canada regarding stalling problems in the proposed class of vehicles and Ford Canada was made aware of these complaints, as copies of the complaints are routinely sent to Ford Canada. The defendants claim that they are not aware of such complaints is a clear indication that complaining to Transport Canada is not an effective means to resolve these types of claims. The evidence is that Transport Canada has not engaged in any prosecutions for the last 10 years. A determination by Transport Canada is not binding or governing in any civil proceeding nor does it have the power to award damages. Hence, it is not an appropriate alternative to the proposed class proceedings": para 95.

77 The above findings by the court in the *Reid* case as to numerous complaints being made to Transport Canada and that Ford was in receipt of such complaints differ significantly from the present case. The evidence on this motion is that having received a copy of the amended Statement of Claim herein, Transport Canada's check of its database indicates that it has received no complaints respecting the door latch mechanism for the Affected Vehicles. As well, Ford's records reveal no complaints arising out of defective operation of the door latch mechanism on any of the Affected Vehicles in any accident. In my view, this is a significant factual distinction. On the evidentiary record here, I do not conclude as did the court in *Reid* that the regulatory regime under the *MSMVSA* and Regulations is not a suitable and preferable procedure to the proposed class proceeding. The plaintiff, in order to justify the certification of his action as a class proceeding, must demonstrate real substantive gains for the court, absent class members, and the defendants. I am not persuaded that the plaintiff has established this aspect of the preferable procedure requirement.

The Representative Plaintiff requirement, s. 5(1)(e)(i)

78 The plaintiff must establish that he can "fairly and adequately represent the interests of the class", that he has produced a workable plan of advancing the claim on behalf of the class and have notified the class members of the proceeding, and does not have an interest in conflict with other members of the class.

79 There is no issue that plaintiff has any interest in conflict with the interests of other members of the class. Accordingly, the inquiry must focus on the capacity of the plaintiff to fairly and adequately represent the interests of the class and the sufficiency of the litigation plan.

80 I turn first to the capacity of the plaintiff as representative plaintiff.

81 It is submitted that the plaintiff is an owner of one of the Affected Vehicles, namely, a 1997 Ford F-150 truck purchased by him in 1998.

82 He is not involved in any other actions or proceedings in which he is claiming the same relief as in the proposed class proceeding. He has retained counsel herein to assist him and counsel have entered into an arrangement with a U.S. law firm, Motley, Rice, for what is described in an agreement reflecting such arrangement as "litigation support". It is submitted that these facts satisfy the requirement that the plaintiff can fairly and adequately represent the interests of the proposed class.

83 It will be recalled that the primary affidavit filed on behalf of the plaintiff was that of Mr. Jekel, the lawyer and member of the Motley, Rice firm.

84 However, no affidavit was sworn by the plaintiff. In this situation, the defendants chose to examine the plaintiff pursuant to the provisions of Rule 39.03 (1); as previously indicated, the transcript of his examination was used at the hearing of the motion.

85 The defendants submit that the plaintiff is incapable of fairly or adequately representing the interests of the proposed class, contending that "he is an unwitting pawn in this action, which was contrived and commenced by plaintiff's counsel and his U.S. colleagues": see para. 155, Magna defendants' factum.

86 In support of such submission, the defendants point to the plaintiff's lack of involvement:

> (1) He was unaware of the alleged safety defects until they were brought to his attention by a law firm in Sudbury, Ontario.
>
> (2) Notwithstanding his knowledge of the alleged safety defects, he has not repaired the vehicle and continues to drive it.

(3) He was unaware of the role of the U.S. law firm and the terms upon which that firm is providing "litigation support" to his Canadian counsel.

(4) He had not reviewed the amended Statement of Claim before his cross-examination and had not reviewed the affidavit of Mr. Jekel until the day before his cross-examination.

(5) He did not know what a litigation plan was and accordingly, had no review or input into the terms of such plan.

(6) He was unable to identify all the vehicles within the Affected Vehicles.

87 In aid of their contention that the plaintiff has only a limited and negligible role in the litigation, the defendants have significantly focused on the arrangements between the plaintiff's Canadian counsel and the U.S. law firm, Motley, Rice.

88 One of the requirements to be found in a representative plaintiff who can fairly and adequately represent the interests of the class is that the representative plaintiff must have competent counsel. In this context, competent counsel entails the court having supervisory jurisdiction over lawyers who seek to represent the interests of litigants.

89 As noted above, the plaintiff's Canadian counsel have entered into an arrangement described as a "co-counsel association agreement" with the U.S. law firm, Motley, Rice, to prosecute the action as a class proceeding. This agreement provides, among other terms, for Motley Rice to supply "litigation support" and "guidance" and to fund the litigation costs herein. The nature of the "litigation support" and "guidance" is such that Canadian counsel must obtain the prior consent of Motley, Rice before incurring and paying any disbursement exceeding $2,500. In addition, there is provision for a fees split between Canadian counsel and Motley, Rice after reimbursement of all litigation expenses incurred by Motley, Rice. The fees allocation is 70% to Canadian counsel and 30% to Motley, Rice.

90 The defendants submit these terms in the co-counsel association agreement indicate that Canadian counsel are improperly splitting fees with non-lawyers for Ontario purposes; as well, there is the potential to conclude that the American lawyers, and in particular, Mr. Jekel, are practicing law in Ontario contrary to s.50 of the *Law Society Act* and s.1 of the *Solicitors' Act*.

91 In response, the plaintiff contends that notwithstanding use of the terms "co-counsel" in the agreement between Canadian counsel and Motley, Rice, the law firm and Mr. Jekel are not holding themselves out as members of the bar qualified to practice in Ontario and are not advising the plaintiff or any member of the class directly. The plaintiff points out that Canadian courts, including this court, have acknowledged the contribution to class proceedings in Canada which can be made by American lawyers experienced in class action litigation in the U.S.: reference is made to the decision of this court in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. S.C.J.).

92 In *Wilson v. Servier Canada Inc.*, the court recognized the contribution of U.S. counsel to Canadian counsel by making an award of costs that reflected the time and disbursements rendered by U.S. counsel to the Canadian counsel. However, U.S. counsel in *Wilson v. Servier Canada Inc.* acted as consultants, billing Canadian counsel for the time and disbursements spent on behalf of the representative plaintiff and the class members. There is no indication that the U.S. counsel in *Wilson v. Servier Canada Inc.* essentially underwrote the entire litigation costs and was sharing in the fees on a percentage basis, as in the present case. In sum, U.S. counsel in *Wilson v. Servier Canada Inc.* were acting as consultants whereas U.S. counsel in this case are acting more as underwriters for the litigation.

93 This latter fact becomes particularly poignant in terms of the capacity of the representative plaintiff to bear any costs that could be ordered against the representative plaintiff. The plaintiff acknowledged in the course of his Rule 39.03 examination that his retainer agreement with Canadian counsel did not provide for any indemnity to him with respect to costs. Although this would in the ordinary course be considered a matter between a litigant and his or her

counsel, subject to either judicial or regulatory oversight as the case may be, it is a significant matter in the context of the plaintiff's capacity to be a representative plaintiff for a class proceeding.

94 Having regard to his general lack of understanding or awareness of the primary evidence, i.e. the Jekel affidavit, in support of the certification motion; his lack of any input to or even review of, the Jekel affidavit; his unawareness of what constitutes a litigation plan is or of what the financial arrangements are between his Canadian counsel and Motley, Rice, I have serious reservations as to whether the plaintiff has capacity to properly instruct counsel on behalf of the members of the putative class.

95 Although these reservations militate against concluding that the plaintiff can fairly and adequately represent the interests of the proposed class, this issue cannot be decided without ascertaining whether the plaintiff has discharged his most important evidentiary burden, that is, producing a workable plan to advance the claims on behalf of the class.

The Litigation Plan requirement, s.5(1)(e)(ii)

96 The importance of a workable litigation plan has been emphasized in many of the certification motion decisions. A thorough definition is found in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.):

> "The interrelation between the different elements of the certification test under s.5(1) has been noted previously in these reasons. The requirements set out for the representative plaintiff accordingly do not stand in isolation. The production of a *workable litigation plan* serves a twofold purpose: It assists the court in determining *whether the class proceeding is indeed the proper procedure;* it allows the court *to determine whether the litigation itself is manageable in its constituted form*. The manageability must be assessed in the context of the entirely of the litigation, not just a common issue trial.
>
> *A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification*." (p. 203)
>
> [emphasis added]

97 There have been recent decisions which appear to soften the requirement for a comprehensive and detailed litigation plan. The following extract is illustrative:

> The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its nature to provide for when the limitations issues will be dealt with or how third-party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure: see *Cloud*, *supra*, para. 95.

98 The question then poses itself: if a litigation plan for purposes of certification is "something of a work in progress", what is the degree of comprehensiveness and sufficiency of detail that must nonetheless be met in order to be "workable" within the meaning of s. 51(e)(ii)?

99 This question must be answered on the basis of a contextual analysis, that is, having regard to the "complexity of the litigation proposed for certification". It is noteworthy that the class in *Cloud* comprised approximately 1400 native children who attended a certain residential school in Brantford, Ontario. The class in *Caputo* was estimated to be in a range of between 2.4 and 5 million persons comprising all residents of Ontario, whether living or deceased, who have ever smoked cigarette products manufactured, marketed or sold by the defendants. The size of the putative class as well as the potential for sub-classes and individual issues related to those sub-classes has significant bearing on the nature of the litigation plan proposed and the assessment as to whether such plan is "workable". The approach taken by Winkler, J. in *Caputo* on this point is instructive and apposite to the present case:

In my view, at a proceeding of this size and complexity, a proper litigation plan should reflect a clear acknowledgment of the massive undertaking involved. Thus, the plan should contain, at a minimum, information as to the manner in which individual issues would be dealt with, details to the knowledge, skill and experience of the class counsel involved, analysis of the resources required to litigate the past members' claims to conclusion and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined: see para. 78

100 A helpful checklist or guide for the requirements of a proper litigation plan in a class proceeding is set out in a paper published in *Law Society of Upper Canada, Special Lectures, 2003*, entitled *Issues of Evidence in a Class Action: An Introduction and Overview*, by Mr. Justice Winkler and Mr. Strosberg. According to the authors, the points to be covered in a proper litigation plan are as follows:

• the manner in which class members will be identified if not known already;

• the particulars of the notice program, including a sample notice and how and where the notice will be published and made available to the public;

• how those who choose to opt out will be dealt with;

• the scheduling of times for delivery of such things as statements of defence, productions, delivery of expert reports and trial date;

• the method of communication with the class;

• the possibility of settlement;

• what will happen if the common issues are decided in favour of the class;

• the method for valuation of damages;

• the details of the process for distribution of the damage award;

• the use of claims forms or other procedures for the distribution;

• what will happen to any surplus funds;

• how insufficient funds will be dealt with; and

• how the individual issues will be dealt with - (pages 74-5).

101 The proffered litigation plan (plan of proceeding) undoubtedly addresses some of the points in the above checklist. Ford, however, makes the following criticisms of the proffered litigation plan:

(1) The plan of proceeding does not contain any information in the proposed notification system enabling members of the class to opt out of the class proceeding if they wish to commence individual lawsuits.

(2) The plan of proceeding does not indicate who would pay costs associated with the notification program.

(3) There is no methodology in the plan of proceeding dealing with any extra-provincial members of the class.

(4) There is no identification in the plan of proceeding as to investigations that have been conducted to date or will be necessary in the future.

(5) The plan of proceeding does not seek to separate common issues from individual issues or to anticipate claims of any potential sub-classes.

(6) The plan fails to plan for steps following a common issues trial, including the determination of any individual issues in the distribution of damages.

(7) The plan or proceeding does not set out the manner in which the defendants' costs will be paid in the event the plaintiff is unsuccessful.

102 Although other criticisms by the defendants of the plan of proceedings such as unrealistically short timelines for the delivery of statements of defence, productions, delivery of expert reports and setting the trial date may be susceptible of amendment, the criticisms by Ford set out in para. 100, above, are substantive and strike at the very core of the proposed litigation plan.

103 Such a situation was addressed in *Caputo*, by Winkler, J:

> ... the plaintiffs have not met the requirement of providing a "workable" litigation plan to the court. Were it the case that this was the only defect, I would normally be inclined to grant a conditional certification, subject to the plaintiffs producing an acceptable litigation plan. However, in this case, the other deficiencies are such that without changing the entire theory of the case, it is not possible for the plaintiffs to satisfy the requirement: para. 79.

104 In the result, I conclude that the plaintiff has failed to meet the requirement of a proper litigation plan, per S.5(1)(e)(ii).

Disposition

105 For the above reasons, I conclude the plaintiff has failed to meet the requirements for certification of the action as a class proceeding in that the plaintiff has failed to discharge his onus of meeting all five criteria set out under s. 5(1) of the *C.P.A.*

106 Accordingly, the plaintiff's motion is dismissed with costs to the defendants.

107 If the parties are unable to agree on the basis and amount of costs, I will entertain written submissions, not to exceed 10 pages (exclusive of supporting materials), according to the following schedule:

(1) by the defendants, within 30 days following the issuance of this ruling;

(2) by the plaintiff, within 15 days following his receipt of the defendants' submissions; and

(3) reply by the defendants, if deemed appropriate, within 10 days of the receipt of the plaintiff's submissions.

Motion dismissed.

2005 CarswellOnt 4544
Ontario Superior Court of Justice

Dumoulin v. Ontario

2005 CarswellOnt 4544, [2005] O.J. No. 3961, 142 A.C.W.S. (3d) 554, 19 C.P.C. (6th) 234, 48 C.L.R. (3d) 72

PAUL DUMOULIN (Plaintiff) and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ONTARIO REALTY CORPORATION, ELLARD-WILLSON ENGINEERING LIMITED, BOIGON ARMSTRONG, PROFAC FACILITY MANAGEMENT SERVICES INC., ELLIS DON CORPORATION AND CLIFFORD RESTORATION LIMITED (Defendants)

Cullity J.

Heard: June 13-16, 20, 2005
Judgment: September 20, 2005
Docket: 02-CV-223772 CP

Counsel: Gary R. Will, Christopher Morrison, Lesley Van Wynsberghe for Moving Party / Plaintiff, Paul Dumoulin
Michael Fleishman, Lee Favreau for Respondent / Defendant, Her Majesty the Queen in Right of Ontario
Paul J. Martin, Laura F. Cooper for Respondent / Defendant, Ontario Realty Corporation
Kathleen Urdahl for Respondent / Defendant, Ellard-Willson Engineering Limited
Bernie McGarva for Respondent / Defendant, Boigon Armstrong
Krista Springstead for Respondent / Defendant, ProFac Facility Management Services Inc.
Don Rasmussen, Heather Acton for Respondent / Defendant, Ellis Don Corporation
Lawrence M. Foy, Michael W. Kerr for Respondent / Defendant, Clifford Restoration Limited

***Cullity J.*:**

1 The plaintiff moved to certify this action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. C. 6 ("CPA"). It arises out of the alleged presence of toxic mould in the courthouse at 50 Eagle Street West in the Town of Newmarket between January 1, 1995 and June 30, 2000. The plaintiff was an employee of York Regional Police who was assigned to the courthouse from 1997. He alleges that, after approximately one year, he began to suffer from respiratory problems. These he attributes to the presence of toxic moulds and other noxious substances in the air inside the courthouse that resulted from the negligent design, construction, control, possession and ongoing maintenance of the building by one or more of the defendants.

2 The involvement of each of the defendants is alleged to have been as follows:

(a) Her Majesty the Queen in Right of Ontario (the "Crown"), by virtue of its ownership, possession and control of the building;

(b) Ontario Realty Corporation ("ORC"), as having responsibility for the management of the courthouse on behalf of the Crown;

(c) Ellard-Willson Engineering Limited ("Ellard-Willson"), as mechanical and electrical engineers retained to provide mechanical engineering services when the courthouse was constructed or in 1979 and 1980;

(d) Boigon Armstrong, as the architects retained for the construction of the courthouse;

(e) Ellis Don Corporation, as a construction company retained as general contractors at the time of the construction of the courthouse;

(f) ProFac Facility Management Services Inc. ("ProFac"), as a company retained by ORC for the purpose of maintaining the courthouse; and

(g) Clifford Restoration Limited ("Clifford"), as a general contractor who did some renovation work on the courthouse during the period.

3 The plaintiff seeks to have the action certified on behalf of a class consisting of:

all persons whom were, by reason of their employment, vocation or compulsion of law, remained within the court house for a cumulative period of 50 hours between the period January 1, 1995 and June 30, 2000

Section 5 (1) (a): disclosure of a cause of action

4 With the exception of counsel for the Crown, defendants' counsel placed little emphasis on the requirement that the pleading discloses a cause of action. Mr Fleishman reiterated the submissions made on an earlier motion ((2004), 71 O.R. (3d) 556 (Ont. S.C.J.)) that section 28 (2) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16 ("WSIA") excludes claims against the Crown by its employees. On the previous occasion, I held that the jurisdiction of the court to decide that question was removed by section 31 (2) of the Act. Since that finding, an unsuccessful attempt has been made to obtain a ruling from the Appeals Tribunal established for the purpose of the Act. I will return to this question later in these reasons. Mr Fleishman's acknowledgement that the claims of other class members had been sufficiently pleaded to satisfy the "plain and obvious" test associated with the decision of the Supreme Court of Canada in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) was expressly limited to the purposes of the motion. I understand that to indicate that the Crown was reserving its right at a trial to rely on section 2 (2) (b) of the *Proceedings Against the Crown Act*, R.S.O. 1990. c. C. 27 as an absolute defence. That question was not resolved at the earlier hearing and it will remain open for decision if a trial of common issues is ordered.

5 Mr Rasmussen also limited his client's acceptance that section 5(1) (a) had been satisfied to the purposes of this motion. Whatever effect that was intended to achieve, I believe, and find, that the necessary elements of a cause of action in negligence have been pleaded against Ellis Don.

6 As the negligence of Clifford is alleged to have occurred in 1996, it is obvious enough that no cause of action has been pleaded on behalf of class members whose presence in the courthouse occurred only before that year. I do not believe, however, that is plain and obvious from the pleading that Clifford's alleged work in renovating the exterior walls of the courthouse in 1996 could have had no bearing on the alleged infiltration and proliferation of toxic mould inside the building.

7 Counsel for ProFac submitted that the claim against his client was "legally untenable" to the extent that it is based on any facts that occurred prior to June, 1999 when its contract at the courthouse commenced. This submission, however, is based on evidence that is not admissible for the purpose of section 5(1)(a) — rather than on the pleading which states that ProFac was retained during "the relevant period" and was negligent "at the relevant times".

8 The three other defendants did not challenge the submission of plaintiff's counsel that causes of action had been sufficiently pleaded against their clients and I am satisfied that they were correct in not doing so.

9 Defendants' counsel were unanimous in their vigorous opposition to Mr Will's submissions on each of the other four requirements in section 5(1) of the CPA. In their submission, none of them was satisfied. Evidence is admissible for these purposes and was provided. While much of it — and of the submissions of defendants' counsel — addressed the merits of the plaintiff's case and the difficulties class members would have in proving causation in particular, it was ostensibly directed at demonstrating the individuality, rather than the commonality, of the claims of the class members

and the overwhelming effect that the existence of such individual issues would have on the question whether the litigation could be managed efficiently.

10 Recurring themes in counsels' submissions in relation to the proposed common issues (section 5(1)(c)) and the preferable procedure (section 5(1) (d)) and, to some extent, the class definition (section 5(1)(b)) included the following:

> (a) it is no part of the plaintiff's case that every member of the proposed class suffered harm from exposure to toxic moulds, or even that they were so exposed. The question whether this occurred will be an individual issue;
>
> (b) whether exposure to dangerous levels occurred would have varied from place to place in the courthouse, and from time to time;
>
> (c) whether those who were exposed may have suffered harm will depend on the degree of exposure and their sensitivity to it;
>
> (d) in consequence, in order to determine whether class members have claims, it would be necessary to decide where, and when they were, in the courthouse and the level of toxic mould present at such times and places;
>
> (e) after findings had been made with respect to each of the above matters, the question whether harm resulted from exposure to toxic moulds or was caused by other airborne contaminants, or personal or environmental factors, would need to be considered. The difficulty of these questions is affected by the nature of the symptoms that the plaintiff alleges can result from exposure to toxic mould; and
>
> (f) the difficulties are compounded by the uncertain state of the relevant scientific, and medical, knowledge as exemplified by the conflicting expert opinions filed on this motion, and by the fact that extensive remedial work has been performed at the courthouse since the expiration of the class period.

11 Defendants' expert witnesses — and counsel — also stressed the ubiquity of mould in the atmosphere and inside buildings and the difficulties of attributing its presence at any particular time to one, or more, of the number of possible different contributing causal factors.

Section 5(1) (b) — an ascertainable class

12 With the recurring themes in the background, defendants' counsel challenged the adequacy of the proposed class definition as both over — inclusive and under-inclusive. As counsel for ORC stated in their factum:

> 73. The class definition should not be overly broad and should not include persons who have no claim against the defendants. The plaintiff must establish that the class could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of class members [citations omitted]
>
> 74. At the same time, the class definition is improper if it is too narrow and arbitrarily excludes persons who have claims similar to those of the class members. Specifically, the class definition should not exclude persons with potential claims simply to make the proceeding more manageable and amenable to certification.
>
> 75 ... The common issues are only "common" in the relevant sense if the class definition identifies all — and not more or less than all — individuals who have a shared interest in the determination of those issues.

13 While the second sentence of paragraph 73 is supported by the reasoning of McLachlin C.J. in *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), the statement in the first sentence is I believe itself too broad and general if it means that an acceptable class must be confined to persons who have valid claims. That would beg the question of the merits of the litigation and it is established that a merits-based definition is not permissible. It is not a requirement of an acceptable class definition that each member of the class will ultimately be successful in establishing a claim for one or more remedies. The often-quoted statement of the Chief Justice that success for one must

mean success for all referred to success on common issues and not to success in the litigation. If, however, it is clear on the evidence presented on the motion that some members of the class have no possible claims, it will, *prima facie*, be too broad. Even then it would not, I think, follow necessarily that it would be unacceptable if it could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of class members. The requirement that there must be a rational connection between the class definition and the common issues will often — but, I think, not always — be sufficient to exclude persons with no possible claims.

14 Unnecessary over-inclusiveness must obviously be avoided because it can affect the likely expense and manageability of the litigation as a class proceeding and have a bearing on the question of preferability.

15 Depending on the nature of the claims and the remedy sought, the sizes and dispersal of the proposed class will be of more relevance in some cases than in others. Decisions such as *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Ont. Div. Ct.), aff'd., [2004] O.J. No. 317 (Ont. Div. Ct.), *Hollick* and *MacDonald (Litigation Guardian of) v. Dufferin-Peel Catholic District School Board* (2000), 20 C.P.C. (5th) 345 (Ont. S.C.J.) — on which defendants' counsel relied heavily — are examples where the courts found that large widely-dispersed classes militated against certification. The possibility that this may be the case is reflected in section 5 (3) which, on a motion for certification, requires each party to provide in affidavits their best information on the number of members of the class. The information provided on behalf of the plaintiff in this case is contained in paragraph 4 of an affidavit sworn by an associate of one of the firms representing the proposed representative plaintiff:

> Based on my review of the file, it appears that the Newmarket Court House has approximately 300 court workers and police staff working in the building on a regular basis. Additionally, there are Justices of the Peace, Judges of the Ontario Court of Justice and Justices of the Superior Court of Justice, who habitually occupy the Newmarket Court House. Further, there are an undetermined number of paralegals, lawyers, process servers, service, maintenance and other workers who, on a regular basis, have occupied the Newmarket Court House.

16 In the statement of claim, the proposed class was defined broadly to comprise all persons who, during the period 1979 to the present, were exposed to toxic moulds, harmful gases and noxious substances while on the premises of the courthouse and suffered adverse health consequences as a result. This class description was open to objection on the ground that it begged the question whether exposure occurred — a question that, unless conceded, would be in issue. The revised definition is intended to meet this objection.

17 It is not part of the plaintiff's case that every member of the redefined class suffered compensatory harm as a result of the alleged exposure to toxic moulds. It was the opinion of Dr Ritchie D. Shoemaker who swore an affidavit contained in the motion record that susceptibility to illness caused by moulds varies among individuals and is affected by genetic factors. As I have indicated, the possibility, and even the likelihood, that some members of the class will not be able to prove that they suffered harm and, thereby, establish a claim is not, by itself, a reason for refusing to certify the proceedings on behalf of the class. The questions to be asked are, first, whether the class could be defined more narrowly without arbitrarily excluding persons who may have claims and whom the plaintiff seeks to represent; and, second, whether there is a required rational connection to the common issues. The class period in the revised definition runs from the time of the first documented concerns regarding air quality at the courthouse to the time when the courthouse was closed in the year 2000 to permit remedial measures to be taken.

18 Defendants' counsel did not suggest that the class definition could be defined more narrowly. In their submission, no adequate definition can be formulated. In my judgment, it is not a valid objection that the class is over-inclusive. The plaintiff has, in effect, pleaded that the defendants breached duties of care owed to the class members by creating a risk that they would be exposed to potentially harmful toxic moulds. Whether such breaches occurred is one of the proposed common issues. In consequence, the required rational connection exists and it is neither suggested, nor apparent to me, that the class definition could be framed more narrowly without excluding persons to whom the duty of care was allegedly owed.

19 The main thrust of the criticism of the proposed class advanced on behalf of the defendants was that it was under-inclusive. Defendants' counsel speculated that selection of the class period had been affected by limitations issues. On that basis, it was submitted that the class definition infringes a principle that it is not permissible to exclude persons with potential claims simply to make the proceeding more manageable and amenable to certification.

20 The principle supported by counsel is, again, in my opinion, far too broadly framed. I see no justification for the proposition that no class proceeding can be certified unless it includes all persons with similar claims against the defendants. I know no provision of the CPA, or policy, that would suggest that plaintiffs, in consultation with their counsel, are not entitled to choose the members of the class to be represented in the proceedings by reference, for example, to the geographical area, city or province in which the plaintiffs reside. In my view, the notion that certification must be denied because a manageable, rather than a possibly unmanageable, class has been chosen — or because an attempt has been made to exclude persons exposed to limitations defences — is similarly untenable. Persons excluded from the class will simply be unaffected by the litigation. It would I believe be an even greater distortion of the words of McLachlin C.J. in *Hollick* to interpret them in the manner supported by defendant's counsel. The Chief Justice's reference to an arbitrary exclusion of persons who share the same interest in the resolution of the common issues was provided to explain when a class definition would be "unnecessarily broad" — namely, when it could be defined more narrowly without resulting in such exclusion. It was, in other words, intended to indicate when a class would be unacceptably over-inclusive — and not to state a requirement that a class must not be under-inclusive. I do not believe the passage is authority that class proceedings are available only when a plaintiff is prepared to sue on behalf of all persons who have the same interest in the common issues.

21 On this part of their submission, defendant's counsel relied heavily on the reasoning of Nordheimer J. in *Pearson*. In dismissing the appeal from that decision, the Divisional Court accepted a defendant's submission that the class definition was irrational and arbitrary in that it was based upon an assumption, unsupported by evidence, with respect to causation. I find nothing irrational, or arbitrary, in the assumption in this class definition that the persons most likely to be affected by exposure to toxic mould in the courthouse, and to share an interest in the resolution of the common issues to which I shall refer, were those who spent at least 50 hours there in the period after moulds were detected. Obviously, the limitation is intended to exclude from the class only those persons who are likely to have had a substantial exposure. The related limitation to those whose presence was due to their employment, vocation or compulsion of law is, in my opinion, likewise unobjectionable. It would, in my opinion, be curious to say the least if courts should simultaneously require that class proceedings be manageable and reject class definitions designed to identify a discrete group in order to ensure that this will be the case.

22 Finally, in connection with the class definition, there is the issue relating to class members who are employees of the Crown. I was informed by Mr Fleishman that the attempt to obtain a ruling on the possible exclusive jurisdiction of the Appeals Tribunal over claims by Crown servants against the Crown had been unsuccessful in the absence of a Crown servant who could respond to the application. In these circumstances, I believe the appropriate order to make would be to refuse certification pursuant to section 5 (2) of CPA unless a member of the putative class who was a Crown employee is proposed to represent a subclass consisting only of such employees. The claims of such employees can be said to a "raise common issues not shared by all class members" within the meaning of the section in the sense that, depending on the decision of the Appeals Tribunal on the jurisdictional question, the common issues that affect them may be limited to their claims against the other defendants. If the tribunal decided that the representative plaintiff who is a Crown servant is not barred from commencing proceedings against the Crown in this court on behalf of the subclass, the certification order could be amended to delete the references to the subclass and to rescind the appointment of its representative plaintiff.

23 In the event that the tribunal decided that a plaintiff appointed to represent the subclass was not entitled to commence proceedings in this court, there might be a potential conflict of interest between the subclass and the other class members with respect to the apportionment of responsibility among the defendants. There might then be a question whether the subclass could continue to participate in the proceedings with separate legal representation, or whether its

members must be excluded from the class. I incline to the former view but would receive any submissions counsel might wish to make on the question if it were to arise. It will not arise unless I find that the requirements for certification are otherwise satisfied.

Section 5(1)(c) — common issues

24 The plaintiff put forward a list of 10 proposed common issues that I believe, with some modifications, can be reduced to the following:

> 1. Did the defendants (or any of them) owe a duty to take care that class members were not harmed by the infiltration of toxic mould?
>
> 2. Did the defendants (or any of them) breach such a duty?
>
> 3. If the answer to 2. is Yes, did any such breach result in the presence in the courthouse of dangerous levels of toxic moulds — namely, levels that would give rise to reasonable foresight of harm to class members?
>
> 4. If the answer to 3. is Yes, what were the potential adverse health consequences to class members?
>
> 5. If the answer to 3. is Yes, can the degree of fault or negligence be apportioned among the defendants and, if so, in what relative proportions?

25 It was common ground between counsel that, for these issues to be acceptable for the purpose of certification, all class members must share an interest in their resolution and such resolution must significantly advance the proceeding. There must also be a basis in the evidence for the existence of the common issues. Although not all members of the class may be able to establish claims, this will often be the case in class proceedings. It is sufficient for the purpose of the requirements of commonality of interest, and a rational connection with the class definition, that a favourable resolution of the proposed common issues will be a prerequisite to the existence of any claim of a class member or, in the case of the last of the issues, a determination of the relative degrees in which defendants will be liable as among themselves.

26 The last of the issues leaves open the possibility that, depending on the findings made in resolving the other common issues, it might be found that the apportionment of fault among the defendants would not be uniform in respect of all class members. On the basis of the uncontradicted evidence, no fault could be attributed to Clifford or ProFac for harm caused before 1996 or June, 1999 respectively. By itself, that should not prevent an apportionment at a trial of the common issues although the question when harm occurred and, in consequence, the apportionment of fault could give rise to individual issues relating to the claims of members who were in the courthouse both before, and after, those dates. If, however, the court were to find that the negligence of particular defendants exposed localised risks to class members, apportionment might need to be determined individually.

27 The opinions expressed in the affidavits of medical and scientific witnesses diverge on a number of relevant matters. The resolution of the medical and scientific issues raised by the inconsistent expert opinions may ultimately determine the outcome of the litigation but it is not my function on this motion to choose between the competing views unless this is necessary for the purpose of determining whether one, or more, of the requirements in section 5(1)(b) through 5(1)(e) is satisfied. Where, for example, commonality itself depends on a disputed question of fact — as it will infrequently do — the question must I think be decided by the motions judge on a balance of probabilities. The necessity for a minimum evidential basis for the common issues relates not to the question whether commonality exists but, rather, to whether the claims to which they relate have any factual support. In my opinion, a sufficient evidential basis for the existence of the common issues has been provided in this case.

28 A large part of the defendants' submissions in opposition to certification was directed at the requirement that a trial of the common issues must significantly advance the proceedings. For this purpose, certification is not dependent on a

finding that the common issues predominate over the individual issues. However, it will be denied if the determination of the former should, realistically, be considered to mark only the commencement of the litigation process.

29 Although defendants' counsels' reliance on the recurring themes I have referred to was not confined to their submissions on the common issues, it was in this context, and the related question of a preferable procedure, that it had most relevance and force. In their submission, individual trials on the question whether class members suffered harm from breaches of duty found at a common issues trial will be required in which the uncertainties, complexities and disagreements relating to the present state of scientific and medical knowledge will be at the forefront. In order to prove causation, each class member would be required to prove (a) his or her exposure to toxic moulds in the courthouse; and (b) whether injury or illness resulted from such exposure or from other personal or environmental factors.

30 I do not believe there is any doubt that a resolution of the common issues would represent an important step in the litigation. It would resolve questions relating to the duty of care, breaches by each of the defendants, the existence of dangerous levels of toxic mould in the building and a causal connection between this and any breach of a duty of care owed by each of the defendants. These are major issues in the litigation to be decided at trial according to the civil test of a balance of probabilities. The fact that they may be difficult and may require a lengthy trial underlines the advantage for all parties of having them dealt with only once. There is still, however, the question whether a determination of these important issues will sufficiently advance the resolution of the claims of class members to justify the use of the procedure under the CPA. To the extent that this may depend upon the manageability and efficiency of the procedure for resolving the individual issues, it will be convenient to consider it in connection with the remaining requirements of section 5(1).

Section 5(1)(d) and 5(1)(e) — the preferable procedure, the representative plaintiff and the litigation plan

31 A class proceeding will not be the preferable procedure unless certification would be consistent with the objectives, or goals, of the CPA. The main thrust of the defendant's submissions with respect to the requirement was that the nature, complexity and difficulty of the individual issues are such that a resolution of the common issues in favour of the plaintiff would not advance the litigation sufficiently to contribute materially either to access to justice, or judicial economy. In particular, it was submitted that a finding that one or more of the defendants breached duties of care by creating a risk of harm to occupants of the court house would leave unresolved the question whether each class member was exposed to mould and whether this could, and did, cause harm. The expert evidence filed on behalf of the defendants was that findings would be required with respect to the particular parts of the courthouse where — and the particular times when — such exposure occurred, its level and its duration.

32 The experts whose opinions were filed on behalf of the plaintiff disagreed that findings of the kind just mentioned would be required. In their view, exposure to any dangerous levels of mould in the courthouse would be uniform throughout it — apparently, at all times during the class period. I am satisfied that this question — and the others to which I have referred — could only be addressed satisfactorily as an individual issue. In particular, the court on a common issues trial could not reasonably be asked to determine whether substantially the same levels of mould were present in each part of the courthouse at all times between January 1, 1995 and June 30, 2000.

33 Expert evidence would be required for the purpose of resolving the individual issues in each case and the task of now determining whether, and to what extent, mould was present at particular times and places would be far more difficult and complex than the common issue relating generally to its presence in the courthouse in the class period. If a class member's exposure to a particular level was found to have occurred, the question whether such exposure caused the symptoms of which the class member complains may require an exclusion of possible causes for such exposure that are not attributable to a defendant's breach of a duty of care — including an enquiry into the presence, and level, of other airborne contaminants in the courthouse at such places and times. The difficulty of these questions is exacerbated by the uncertainty of the present state of related scientific and medical knowledge, and the fact that, if the remedial work performed in the courthouse was successful, the conditions that gave rise to the claims of class members are no longer in existence. Possible causes for the symptoms in the member's personal environment would also need to be considered. Expert evidence on these matters also is likely to be required in connection with each member's claim. In the absence of

any other suggested procedure for resolving these individual issues, trials would be required and these, in the submission of defendants' counsel, would inevitably be protracted and expensive.

34 An inquiry into uniquely personal health and environmental factors when deciding issues of causation is, of course, not uncommon in personal injury cases. Class actions have been certified despite the existence of numerous such issues; see, for example, *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. S.C.J.) where certification was granted notwithstanding the defendant's identification of more than 20 individual issues of this kind. The bearing that their existence should have on the question whether the resolution of the common issues in favour of a class will sufficiently advance the proceeding will necessarily vary according to the facts of each case. Expert opinion evidence will often assist in answering the question. Here, the weight of the evidence underlines the peculiar difficulty and complexity of the individual issues of causation that arise from the ubiquitous nature of mould, and the fact that the health consequences of exposure to it are matters of considerable scientific and medical controversy.

35 The expert witnesses whose affidavits were filed on behalf of the defendants were in agreement with respect to the multitude of individual issues relevant to causation. These are reflected in the conclusions of Dr Ronald E. Gots of the International Centre for Toxicology and Medicine, in the State of Maryland:

> There is no possible scientifically-justified basis for treating the proposed class members in this litigation as having a common disorder or set of disorders with a common, uniform cause. While users of the courthouse may believe that mold has caused numerous symptoms, such a belief is neither uncommon, nor commonly accurate. There are innumerable potential causes of symptoms. There are numerous alternative causal agents for each individual. As far as mold is concerned, individual susceptibilities to mold will vary and relatively few, statistically, will have such susceptibilities; exposure, if any, will be quite variable; other sources of mold (i.e., home) exposure and exposures to other allergens is ubiquitous; alternate causes of symptoms must be investigated individually; and, the fact of numerous complaints by no means establishes a common indoor air cause of symptoms.
>
> To summarize:
>
> > (a) causes of each individual's symptoms are variable and require individual assessments. They may or may not be related to mold. The probability is that most are not.
> >
> > (b) the sources of potential causal agents: indoor, outdoor, courthouse-related, home-related or other, must be individually assessed.
> >
> > (c) symptom timing is variable among proposed class members and must be correlated with individual activities and locations at those specific times.
> >
> > (d) even if mold it turns out to be a potential factor in some cases, the origin and source of the mold will have to be assessed individually.

36 While the expert evidence filed on behalf of the plaintiff disagreed strongly with opinions expressed by Dr Gots, the disagreement, for the main part, related to the common issues rather than to those identified in the passages I have quoted.

37 I note that the individual issues arising out of the variable personal factors to which Dr Gots referred are in addition to those relating to the threshold question of the extent to which each class member was, in fact, exposed to toxic mould at particular times and places in the courthouse. The importance of the threshold question was strongly affirmed by Dr Gots and by a certified toxicologist — Dr Mark Goldberg — who stated:

> The erroneous opinion that exposure to "toxic chemicals" at any dose produces deleterious effects abounds in the lay public. The fact that dose defines toxicity for chemicals has been recognized for centuries. It is critically relevant

> to an assessment and understanding of any claim that might be advanced by any potential class member in these proceedings.

38 Dr Tang Gim Lee — whose affidavit was filed on behalf of the plaintiff — was of the same opinion:

> While a person will be exposed to mould from different places, the concentration of specific species of mould and the length of expos[ure] are significant in causing health symptoms.

An assumption that the length of exposure is relevant is, moreover, reflected in the class definition.

39 The views of these expert witnesses contrast with that of Dr Shoemaker — a physician whose private practice and research for the past eight years has centred on the diagnosis and treatment of patients suffering from adverse health effects after exposure to water-damaged buildings. In his opinion, "mould illness" is not dose related.

40 On the basis of all the evidence, I do not consider Dr Shoemaker's opinion on the threshold issue to be sufficient to justify a finding that it will be unnecessary to confront each of the individual issues relating to causation that have been identified by the defendants. The existence, complexity and difficulty of these issues have not, in my opinion, been challenged effectively by the plaintiff. To the extent that Dr Shoemaker's preferred procedure for resolving these issues would require class members to be subjected again to the conditions prevailing in the courthouse during the class period, his evidence reinforces the persuasiveness of the defendants' submissions with respect to the complex nature of the fact-finding process that would need to be conducted in respect of each class member. It would also raise further issues with respect to the effectiveness of the remedial measures taken after the expiration of the period. If it was found that such measures were successful and that, in consequence, the preferred procedure could not be followed, it was Dr Shoemaker's opinion that:

> ... we can still obtain confirmation of causation to a reasonable degree of medical certainty by evaluating the building cohort as a whole, comparing their symptoms and biomarkers to established control groups.

41 Dr Shoemaker did not elaborate on that assertion and explain precisely what would be involved in his suggested alternate procedure. To the extent that the effectiveness of the procedure may be premised on his belief that the risk of adverse health consequences from mould exposure was not dose related and was, therefore, unaffected by the existence of different levels of mould throughout the building, his opinion is, as I have indicated, inconsistent with that of the other expert witnesses and I am not prepared to certify the proceedings on the basis that it is correct. In addition, unless a substantial uniformity of dangerous levels of mould exposure existed throughout the building and throughout the period, a comparison of the symptoms exhibited by all class members with those of occupants of buildings that have not suffered water damage could not establish a necessary causal connection with the conduct of the defendants. The symptoms of mould illness are not unique and the question whether a particular member was exposed to dangerous levels of mould attributable to the conduct of defendants might still be very much in issue.

42 The important question is whether, despite the existence of the individual issues, the plaintiff has discharged the burden of demonstrating that a resolution of the common issues will sufficiently advance the proceeding to justify certification.

43 A class proceeding will not be the preferable procedure unless there is a realistic possibility that it will result in a resolution of the claims of class members in a reasonably efficient manner. It must be a "fair, efficient and manageable method of advancing the claim": *Hollick*, at para 28. A relevant factor in this case is the expense that is likely to be involved both in a common issues trial and in the resolution of the individual issues. If, in either case, it is likely to be prohibitive, the proceedings will not be efficient or manageable in the required sense, and access to justice will not have been achieved. While I accept the submission of plaintiff's counsel that the complexity of the common issues may militate in favour of certification, the reverse can be true when it affects the resolution of individual issues.

44 On the question of manageability, the court is entitled to look for assistance in the contents of the plaintiff's proposed litigation plan that, pursuant to section 5(1) (e), is to set out a "workable method of advancing the proceeding". On the facts of this case, the following passages in the reasons of Winkler J. in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.) and *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) are particularly apposite:

> The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and, it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.
>
> A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification. (*Bre-X*, at page 203)
>
> ... the plan should contain, at a minimum, information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined. (*Caputo*, at para 78)

45 Here, neither the plan nor the evidence addresses the ability of the plaintiff to carry the financial burden of a common issues trial, or the procedure by which the complex individual issues would be determined.

46 The likely length and expense of a common issues trial involving difficult and complex issues of fact, multiple defendants, expert witnesses, and possible third party claims, persuades me that this is a case in which the court should be provided with an assurance that the plaintiff has the necessary financial resources, or backing, to carry the prosecution of the litigation through to the completion of the trial. As Nordheimer J. stated in *Pearson*:

> An important consideration, in determining whether the representative plaintiff would "adequately" represent the interests of the class, is the ability of that representative plaintiff to bear the costs that will be necessary for the proper prosecution of the class action. Certifying a class proceeding without demonstrating that such a capacity exists could represent a real risk to class members who will be bound, and whose rights will be finally adjudicated, by the outcome of the proceedings. (at para 140)

47 I would add that I believe that proceedings should not be certified unless the court is satisfied that there is a realistic possibility that a common issues trial will be held if the matter is not settled beforehand.

48 Equally as important is the complete absence in the litigation plan of any reference to the procedure by which the individual issues of causation and damages would be resolved. The lack of attention given in the plan — and in the evidence filed on behalf of the plaintiff — to the resolution of the individual issues suggests that it was considered that certification would remove the only significant barrier to recovery by class members. On the evidence, this would not be the case.

49 The amount of detail required in a litigation plan will vary from case to case. In view of the nature, difficulty and complexity of the issues in this case, a workable plan was essential if the court was to be satisfied that access to justice will be achieved by certification or, indeed, that any purpose would be served other than an enhanced ability of the plaintiff to negotiate a settlement. Class proceedings create special burdens, expenses and potential financial risks for defendants. It is a truism that, because of the amounts at stake, certification is very commonly followed by a settlement. However, nothing in the CPA permits the possibility that a settlement may be negotiated in the future to enter into the preferability analysis. Fairness to defendants opposing certification requires that this should not be done.

50 If it is contemplated that individual trials would be conducted before a judge, the evidence indicates that each such trial may be protracted and expensive. The record contains no information that would permit even the most cursory costs/benefits analysis to be attempted in respect of the class. There is no evidence that suggests that any class members, other than the plaintiff — and one person who has commenced an individual action and has indicated her intention to opt out of this proceeding if it is certified — would be willing to accept the financial risk inherent in such trials.

51 I am satisfied that, in the circumstances of this case, the absence of evidence, and a plan, that would satisfactorily address — and resolve or minimize — the difficulties that would be involved in dealing with the individual issues is fatal to the attempt to have these proceedings certified on the basis only of the material in the record. In my judgment, the plaintiff has not, as yet, discharged the burden of demonstrating, on a balance of probabilities, that a common-issues trial would advance the proceeding at all — much less that certification would result in an efficient, fair and manageable method of resolving the claims of class members consistently with the objectives of the CPA.

52 Section 5 (4) of the CPA contemplates that it may be appropriate for a motion for certification to be adjourned to permit further materials or evidence to be filed. I believe this is such a case. The plaintiff will be allowed 30 days to propose a representative plaintiff for the subclass of Crown employees and to file a revised litigation plan that addresses the procedure for resolving the individual issues. In addition, a reasoned estimate of the number of class members who are likely to participate in that procedure — or, at least, whose participation is likely to be economically viable — is to be provided. I wish also to have an estimate of the costs that will be incurred by the plaintiff in proceeding with a trial of the common issues, and an indication of how these costs are to be borne. The defendants will have another 30 days in which to file any further responding materials.

Motion adjourned.

2011 ONSC 1647
Ontario Superior Court of Justice [Commercial List]

Robertson v. ProQuest Information & Learning Co.

2011 CarswellOnt 1770, 2011 ONSC 1647, [2011] O.J. No. 1160, 199 A.C.W.S. (3d) 757

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

HEATHER ROBERTSON (Plaintiff) and PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC. (Defendants)

Pepall J.

Judgment: March 15, 2011
Docket: 03-CV-252945CP, CV-10-8533-00CL

Counsel: Kirk Baert, for Plaintiff
Peter J. Osborne, Kate McGrann, for Canwest Publishing Inc.
Alex Cobb, for CCAA Applicants
Ashley Taylor, Maria Konyukhova, for Monitor

***Pepall J.*:**

Overview

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

2 The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

3 The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights

in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

4 As set out in the certification order, the class consists of:

A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

5 As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

6 The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

7 Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

9 Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

10 Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

11 In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;

2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;

3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and

4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

12 The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

13 In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;

b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;

c) the action would be dismissed as against CPI;

d) CPI did not admit liability; and

e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

14 The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

15 After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

16 In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

17 In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.

> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

18 The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

19 The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

20 Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

21 As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*" [1] :

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society*, *(Re:) Grace Canada Inc., Muscletech Research and Development Inc.*, and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) CCAA Settlements in General

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Lehndorff General Partner Ltd., Re*, [2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Calpine Canada Energy Ltd., Re* [3]; *Air Canada, Re* [4]; and *Playdium Entertainment Corp., Re*. [5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Air Canada, Re* [6] and *Calpine Canada Energy Ltd., Re*. [7]

(ii) Class Proceedings Settlement

23 The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992 [8] . That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada* [9] .The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;

b) the recommendation and experience of class counsel; and

c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

25 A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada* [10] :

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

26 Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program v. Chevron Chemical Co.* [11]

(iii) The Robertson Settlement

27 I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

28 As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

29 The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

30 In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

31 The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada Ltd.* [12]

.

32 The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada Ltd.*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation. [13]

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

34 The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

Motion granted.

Footnotes

1 Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

2 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at 31 .

3 2007 ABQB 504 (Alta. Q.B.) at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A. [In Chambers]).

4 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

5 (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at para. 23.

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, C.6.

9 [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

10 (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at para 30.

11 [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

12 [2009] O.J. No. 2650 at para. 15.

13 *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (Ont. S.C.J.) para. 20.

2016 ONSC 7354
Ontario Superior Court of Justice

Keyton v. Canada Lithium Corp.

2016 CarswellOnt 18867, 2016 ONSC 7354, 273 A.C.W.S. (3d) 702

JOHN KEYTON and HUGH LATIMER (Plaintiffs) and CANADA LITHIUM CORP., PETER SECKER, CHARLES TASCHEREAU, MITCHELL LAVERY and MICHELLE STONE (Defendants)

Perell J.

Heard: November 23, 2016
Judgment: November 28, 2016
Docket: CV-12-462933CP

Counsel: Michael G. Robb, for Plaintiffs
Dana M. Peebles, for Defendants, Canada Lithium Corp., Peter Secker, Charles Taschereau and Mitchell Lavery
H. James Marin, for Defendant, Michelle Stone

***Perell J.*:**

1. Introduction

1 Pursuant to the *Class Proceedings Act*, *1992*, S.O. 1992, c.6, John Keyton and Hugh Latimer, who invested in the securities of Canada Lithium Corp. (now known as RB Energy Inc. or Énergie RB Inc.), were successful in having a securities misrepresentation action certified as a class action. The action, which advanced claims under the Ontario *Securities Act*, R.S.O. 1990, c. S.5, was against Canada Lithium, Peter Secker, Charles Taschereau, Mitchell Lavery, who are directors and officers of Canada Lithium, and Michelle Stone, who is a geoscientist.

2 Unfortunately for Messrs. Keyton and Latimer, Canada Lithium was ultimately placed in receivership, and it has no exigible assets. All but $400,000 of insurance coverage, which is being depleted by the ongoing litigation, is left for recovery.

3 Messrs. Keyton and Latimer, along with Canada Lithium's receiver and the other Defendants, have now agreed to settle the action and they bring a motion for approval of the settlement. The settlement is based on a discontinuance of the action along with a bar order precluding the Class Members from advancing any cause of action that was or that could have been asserted in Messrs. Keyton's and Latimer's action.

4 The settlement agreement, which is subject to court approval, provides for the payment of the $400,000 in exchange for releases. The $400,000 is not to be paid to the Class Members but rather is to be paid to Class Counsel, who have disbursements of $159,038.13 and docketed time of $633,410.50, excluding the time for the preparation of the settlement approval motion now before the court.

5 After the settlement agreement was signed, the Defendants indicated that as an alternative to receiving releases, the settlement could be implemented by a discontinuance of the action with a term of the discontinuance being a bar Order precluding new actions by the Class Members.

6 The Class Members have not been given notice of this motion, and it is proposed that they be given notice after the settlement and after the fee award are approved.

7 For the reasons that follow, I shall approve the settlement as originally envisioned by the parties, and I direct that notice of the settlement approval be given to Class Members by having a notice posted on Class Counsel's website.

8 A discontinuance with a bar Order is a contradiction in terms and all that is required in the immediate case is approval of the settlement, which includes a release, and approval of Class Counsel's fee request.

2. Factual Background

9 Canada Lithium was a public company engaged in the exploration, development, and production of lithium carbonate. It had a project near the city of Val d'Or, Québec. Messrs. Keyton and Latimer commenced what was then a proposed class action following disclosures by the Defendants that: (a) there were "significant issues" with geological modeling underlying a mineral resource estimate; and, (b) there would be a materially negative reduction to the estimate as a consequence.

10 Those disclosures led Messrs. Keyton and Latimer to conclude that the Canada Lithium's mineral resource estimate assigned lithium grades to areas that had not been sampled and included barren areas with no lithium at all. They concluded that the mineral resource estimate did not accord with the Canadian Securities Administrators' National Instrument 43-101, *Standards of Disclosure for Mineral Projects*.

11 In the action, Messrs. Keyton and Latimer alleged that, contrary to the Ontario *Securities Act*, there were misrepresentations as to the material scientific and technical information underlying the mineral resource estimates. They alleged that the misrepresentations were made in a prospectus under which Canada Lithium raised in excess of $100 million and the misrepresentations were also made in secondary market disclosure documents. Messrs. Keyton and Latimer alleged economic loss resulting from the misrepresentations and claimed damages from the Defendants under Parts XXIII and XXIII.1 of the Ontario *Securities Act.*

12 The Defendants denied, and continue to deny, the allegations.

3. Procedural History

13 The action was commenced at London, Ontario, in April 2011, and subsequently transferred to Toronto.

14 Initially, additional individual defendants were named but on consent, the action was discontinued against these defendants in July 2012.

15 On August 6, 2013, the remaining Defendants consented to an order granting, amongst other things, leave to proceed under Part XXIII.1 of the Ontario *Securities Act* and certification of the action as a class proceeding, which order was amended by a further consent order issued August 19, 2013.

16 The Opt-Out deadline was November 25, 2013. There were 15 Class Members who opted out of the action. To the knowledge of Class Counsel, no opt-out party has commenced another proceeding in relation to the matters at issue in the action.

17 Pleadings closed in February 2014, following which the parties engaged in extensive and technical documentary discovery. The Defendants produced in excess of 15,000 documents. Examinations for discovery were scheduled to occur in the fall of 2014, to be completed by November 30, 2014.

18 As the action moved forward, Canada Lithium's financial situation deteriorated, and Canada Lithium and its wholly-owned direct subsidiaries, Québec Lithium Inc., QLI Metals Inc. and Sirroco Mining Inc., sought and obtained creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). On October 14, 2014, the action was stayed as against all Defendants, except Dr. Michelle Stone. Thereafter, the action remained stayed

with respect to Canada Lithium to May 8, 2015; and, with respect to the individual Defendants, except Dr. Stone, to June 21, 2016.

19 Canada Lithium and its subsidiaries failed to achieve a plan of compromise under the *CCAA*; and, while in *CCAA* protection, a sale of Canada Lithium's business and assets was also unsuccessful. This resulted in the termination of the *CCAA* proceedings and in transitioning Canada Lithium and its subsidiaries transitioning into a receivership. The receivership occurred in May 2015, on the application of a creditor with a court-ordered first charge.

20 Under receivership, it was determined: (a) that it would take approximately $150 million to $200 million and a further 12 to 18 months to bring Canada Lithium's Québec Lithium Project into commercial production (50% of full production); and (b) that the Québec Lithium Project had significant environmental issues requiring monthly capital expenditure in the hundreds of thousands of dollars until a permanent fix could be instituted, estimated to cost $30 million.

21 Substantially, all of the business and assets of Canada Lithium and its subsidiaries were sold in June 2016. While Canada Lithium had invested approximately $350 million in the Québec Lithium Project, it had financial debt obligations of approximately one-third of that amount at the time. It has been disclosed that the sale, for an undisclosed amount, resulted in a "substantial shortfall" to Investissement Québec, a subordinate secured lender and guarantor. There has been no payment to unsecured creditors, and the receiver has advised that shareholders will not recover any value.

22 The only remaining asset of Canada Lithium, excluding any tax attributes, is an indirect shareholding interest in a Chilean company, Atacama Minerals Chile S.C.M., which is itself heavily indebted and owns and operates a negative cash flow iodine mine in Chile. The indirect shareholding in Atacama was optioned to the new owner of the Québec Lithium Project for $10,000.

23 The *CCAA* stay affecting the action, except Dr. Stone, has been terminated following court approval of the sale.

4. The Proposed Settlement and Discontinuance

24 The parties, through their counsel, and the receiver, entered into a settlement agreement. The settlement required a payment of $400,000 for the benefit of the Class in full settlement of the action, including all interest and legal fees incurred. The settlement is not an admission of liability and the Defendants continue to deny any wrongdoing, including all allegations against them in the action. In exchange for payment, the Defendants are to receive a full and final release from all Class Members.

25 After a case management conference with the Court, at which alternate forms of resolution were discussed, counsel for the Defendants indicated that the Defendants would accept, in lieu of releases, a bar on the commencement of further claims in relation to the matters at issue.

26 Class Counsel recommends the settlement. In making the recommendation, Class Counsel understood that the estate of Canada Lithium is insufficient to satisfy creditor claims, with the result that there is likely to be no estate available to satisfy any judgment or settlement that might be obtained by the Class. Class Counsel considered the risk of continued litigation to recover any remaining available insurance coverage. Class Counsel determined that there are no viable alternate sources of recovery. While Class Counsel believed the claims advanced in the action have merit, they see no realistic prospect of significant recovery beyond the amount provided for by the settlement agreement.

27 Class Counsel believe that continued litigation will deplete the available insurance funds. Early in the prosecution of the action, counsel for Canada Lithium and Defendants Secker, Lavery and Taschereau, provided Class Counsel with a copy of a directors and officers professional liability insurance policy. The significant aspects of the D&O Policy are that the policy limit (including excess side coverage) is $3 million; however, the policy is a wasting policy such that defence costs are drawn against the limits and reduce the coverage available to fund any judgment or settlement. Counsel to

those Defendants for which the D&O Policy is responding have advised that the D&O Policy will, after anticipated legal costs to complete the settlement, be exhausted or almost exhausted by payment of the settlement amount.

28 The Representative Plaintiffs have sought to identify other viable sources of recovery, to no avail. Coverage has been denied under Dr. Stone's professional liability insurance policy, which has a policy limit of $100,000. She is also no longer practicing as a professional geoscientist and is unable, at this time, to fund a personal contribution to a settlement. Additionally, the personal means of the individual Defendants who may have liability appear insufficient to satisfy a judgment or fund a settlement any greater than has been achieved.

29 In light of Canada Lithium's insolvency and the absence of viable alternate sources of recovery, Class Counsel have concluded that the remaining D&O Policy limits are now the only realistic source of recovery for the Class; and, if the action is not resolved now, continuing the action will fully exhaust the remaining D&O Policy limits well before trial.

30 The Representative Plaintiffs have approved and support the settlement with the Defendants. They also support the proposed discontinuance.

31 Class Counsel, in consultation with RicePoint Administration Inc., a class action claims administrator, has determined that the settlement amount is insufficient for distribution to Class Members. The parties also agree that the settlement amount is not appropriate for an economic and efficient distribution to the Class.

32 For practical and cost efficiencies, notice of the pendency of this motion has not been given. Class Counsel believes dispensation of pre-approval notice is desirable in all of the circumstances and is also in the interests of judicial economy.

33 Class Counsel propose a form of notice to be posted to the website for the action. It is proposed that the website will also be updated to advise, for a period of no less than 12 months, that the action has been settled and discontinued. Any settlement and discontinuance order will also be posted there. Additionally, Class Counsel proposes to contact each person who has contacted it about the action, to provide information relating to any settlement approval and discontinuance order that may be made, and to provide a copy of the notice and order.

5. Class Counsel's Fee Request

34 Class Counsel request fees, including disbursements and taxes, in the amount of $400,000 to be paid as a term of the discontinuance. This equates to the total settlement amount. The $400,000 is to be allocated as follows: (a) $159,038.13 for disbursements; (b) $20,585.38 for HST on disbursements; (c) $195,023.44 for fees (i.e. approximately 31% of total docketed time before tax); and, (d) $25,353.05 for HST on fees.

35 The request falls outside the terms of the retainer agreements between the Representative Plaintiffs and Class Counsel. However, Class Counsel's investment in the case significantly exceeds the amount recovered from the settlement, and the Representative Plaintiffs' instructions are to request that, as a term of the discontinuance, the entire settlement amount, payable by the Defendants for the benefit of the Class, be paid to Class Counsel on account of fees and disbursements incurred.

36 Class Counsel have docketed time of $633,410.50 and financed disbursements of $159,038.13, excluding time and disbursements for the preparation of the settlement approval motion.

6. Settlement Approval

37 Section 29 (1) of the *Class Proceedings Act, 1992*, governs the discontinuance, abandonment and settlement of class actions. Section 29 states:

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

38 As may be noted, s. 29(4) of the *Act* provides that in approving a discontinuance, abandonment, or settlement, the court shall consider whether notice should be given. In the immediate case, assuming I approved the settlement with a release of the claims against the Defendants or assuming I approved a discontinuance with a bar Order, in either case no purpose would be served by giving notice to the Class Members apart from giving them information that the litigation is over. It is clear that no purpose would be served by continuing this action and no purpose would be served by giving notice apart from informing Class Members that there is nothing that they need do or could do to salvage the situation. I agree with Class Counsel that in the circumstances of this case, it would have served no purpose to notify Class Members of the settlement approval hearing. It would have been a waste of time and money.

39 Given that the action has been certified as a class proceeding and by not opting out the Class Members are bound by any settlement order, I see no purpose in discontinuing the action with a bar Order. Typically, class actions are discontinued before, not after certification, and in my opinion, it is a contradiction to discontinue a class action and impose a bar Order on the Class Members. The bar Order, practically speaking, would operate much the same way as a release would operate. The contradiction is that a discontinuance is not intended to be a determination on the merits or to preclude Class Members from commencing their own action if they were so inclined. This motion should be treated as a straightforward settlement approval motion with the variation that notice of the motion along with its outcome will be given after the fact.

40 Section 29(2) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (Ont. S.C.J.) at para. 57; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (Ont. S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Co.*, 2013 ONSC 1868 (Ont. S.C.J.).

41 In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court

the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.) at para. 38; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Co.*, *supra*.

42 The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.* (2002), 24 C.P.C. (5th) 396 (Ont. S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 A.C.W.S. (3d) 12 (Ont. S.C.J.) [2007 CarswellOnt 3735 (Ont. S.C.J.)] at para. 17.

43 In the immediate case, having regard to the various factors that the court must consider in approving or rejecting a settlement, I conclude that the settlement is fair, reasonable, and the best interests of the Class Members. Messrs. Keyton and Latimer and Class Counsel made a valiant effort but further litigation is without meaningful purpose and the settlement is the best that can be achieved to advance the purpose of the *Class Proceedings Act, 1992*. I approve the settlement.

7. Class Counsel Fees

44 The court has jurisdiction under s. 32(4) of the *Class Proceedings Act, 1992*, to order the proposed class counsel fees. Section 32(4) provides:

> *Determination of fees where agreement not approved*
>
> (4) If an agreement is not approved by the court, the court may,
>
> > (a) determine the amount owing to the solicitor in respect of fees and disbursements;
> >
> > (b) direct a reference under the rules of court to determine the amount owing; or
> >
> > (c) direct that the amount owing be determined in any other manner.

45 Class Counsel have not sought approval of their retainer agreements with the Representative Plaintiffs, as they might have, under s. 32(2) of the *Act*. Notwithstanding, the court may still determine appropriate fees and disbursements, pursuant to s. 32(4). The Court of Appeal, in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 (Ont. C.A.), stated at para. 69:

> Section 32(4), however, does not require that a fee agreement be expressly disapproved before it applies. Section 32(4) applies whenever there is no approval of the fee agreement. This is made clear by the opening words of s. 32(4), which clearly state that the court's authority to determine the amount owing to class counsel in respect of fees and disbursements under that subsection arises "if an agreement is not approved by the court".

46 The Court of Appeal also found that the court's authority under s. 32(4) is far more expansive than its authority under s. 33(7); the Court stated at para. 55: "Section 33(7) provides only for the base fee/multiplier approach, whereas s. 32(4) provides the court with broad discretion to set the fee, direct a reference or direct the fee be determined in any other manner."

47 The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (Ont. S.C.J.) at para. 13; *Smith Estate v. National Money Mart Co.*,

2010 ONSC 1334 (Ont. S.C.J.) at paras. 19-20, varied 2011 ONCA 233 (Ont. C.A.); *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 5649 (Ont. S.C.J.) at para. 25.

48 Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith Estate v. National Money Mart Co.*, *supra*; *Fischer v. IG Investment Management Ltd.*, *supra*, at para. 28.

49 In my opinion, having regard to the various factors used to determine whether to approve the fees of class counsel, the fee request in the immediate case should be approved. The fee award recognizes that class counsel undertook and actually experienced the litigation risks associated with class proceedings, which include the risk of defendants becoming impecunious making further proceedings meaningless.

8. Conclusion

50 In the result, I approve the settlement and Class Counsel's fee request. A notice of this outcome shall be posted on Class Counsel's website. An order should be taken out in accordance with these Reasons for Decision.

Motion granted.

2012 ONSC 2985
Ontario Superior Court of Justice

6323588 Canada Ltd. v. 709528 Ontario Ltd.

2012 CarswellOnt 6496, 2012 ONSC 2985, [2012] O.J. No. 2324

6323588 Canada Ltd., Plaintiff/Moving Party and 709528 Ontario Ltd., o/a Panzerotto Pizza and Wing Machine, Joseph Schiavone, Vito Schiavone, Frank Schiavone and Alexander Schiavone, Defendants/Respondents

G.R. Strathy J.

Heard: May 14, 2012
Judgment: May 23, 2012
Docket: CV-08-7587-00CL

Counsel: Ben V. Hanuka, for Plaintiff / Moving Party
Avrum D. Slodovnick, for Defendants / Respondents

***G.R. Strathy J.*:**

1 This is a motion for certification of this action as a class proceeding pursuant to s. 5 of the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the *C.P.A.)*.

2 This was an unusual certification motion. The defendant made a very strategic and focused attack on the suitability of the putative representative plaintiff. There was little debate about the other certification requirements.

I. Background

(a) The Franchisee and the Franchisor

3 The plaintiff, 6323588 Canada Ltd. (the Franchisee), is a former Panzerotto Pizza franchisee. It operated a store located at the intersection of Yonge Street and Davisville Avenue in Toronto, from about January 2005 to late April 2008 when it abandoned the business.

4 The Franchisee was incorporated in December 2004 by Oxana Leo for the purpose of operating the Panzerotto Pizza franchise. She is the sole officer, director and shareholder of the Franchisee. She delegated most of the day-to-day operation and management of the franchise to her husband, Domenic Leo.

5 The franchisor, the defendant 709528 Ontario Ltd., o/a Panzerotto Pizza and Wing Machine (the Franchisor or 709) is an Ontario company. The Panzerotto Pizza business was established in 1976 by the Schiavone family. The chain has always been fairly small and carried on business entirely in the Greater Toronto Area. In the mid-1990s, the Franchisor acquired the "Wing Machine" business from a trustee in bankruptcy. This was a small franchise operation, also based in Toronto. The Panzerotto and Wing Machine operations consisted of retail outlets that offered quick service takeout and delivery of pizza, panzerottos, chicken wings, sandwiches and side dishes.

6 The defendant Alexander Schiavone is the father of the other individual defendants. He retired from the business in 1997 and has not been involved in the business for many years. He is disabled as a result of a stroke and resides in a seniors' residence.

7 Joseph Schiavone is the President, sole officer, director and shareholder of the Franchisor. He operated the business with some management assistance from his brothers Vito and Frank Schiavone.

8 There appear to be a total of 52 stores in the combined Panzerotto and Wing Machine system. Some of these are "corporate stores", owned and operated directly by the Franchisor. The best estimate of counsel is that there are 17 Panzerotto outlets, 5 Wing Machine outlets and 15 stores that are "co-branded", operating both a Panzerotto store and a Wing Machine store under the same roof. There seems to be no dispute that the Panzerotto and Wing Machine franchises use the same form of franchise agreement and the same disclosure documentation.

9 In July 2011, the Franchisor sold the assets of its business, including the franchise agreements, to Gino's Pizza.

(b) Overview of the Plaintiff's Claim

10 The plaintiff's claim relates to three aspects of the franchise business.

11 First, the plaintiff claims that the Franchisor is required to account to the franchisees for, and to pay to them, "Excess Advertising Contributions" — that is, amounts paid by the franchisees to an advertising fund that were in excess of what the Franchisor was reasonably required to pay for advertising.

12 It is alleged that under the terms of the franchise agreement, the franchisees were required to pay to the Franchisor to be used for the purposes of advertising:

(a) with respect to Panzerotto outlets, the greater of $175 per week plus GST or 5% of delivery sales per week;

(b) with respect to Wing Machine outlets, the greater of $150 per week plus GST or 3% of sales per week;

(c) with respect to both Panzerotto and Wing Machine outlets, a Supplementary Advertising Contribution of 75 cents plus GST on each delivery order.

13 The second claim relates to what the plaintiff calls "Excess Order Processing Contributions". The Panzerotto and Wing Machine franchisees were required to pay $1.25 plus GST on each delivery order, to cover the cost of processing of orders, which was done at a centralized facility operated by the Franchisor. The plaintiff claims that these contributions exceeded what was reasonably attributable to the franchisees' share of the related costs and that they are entitled to a refund of the difference.

14 The third claim relates to "Product Rebates" — that is, payments in the form of rebates, bonuses, discounts and other allowances that the Franchisor received from suppliers on account of supplies sold to franchisees. The plaintiff claims that franchisees are entitled to share in these rebates.

15 In summary, then, the plaintiff claims:

(a) damages equal to the Excess Advertising Contributions and Excess Order Processing Contributions, an accounting of such excess contributions and disgorgement of all profits and benefits;

(b) damages equal to class members' share of the product rebates; and

(c) punitive damages for bad faith and breach of fiduciary duty.

16 These claims will be discussed in more detail when I discuss the causes of action asserted by the plaintiff and the common issues.

17 The Franchisee seeks to have this action certified as a class proceeding on behalf of a class of present and former Panzerotto Pizza and Wing Machine franchisees. I will describe the proposed class in more detail below.

18 I will now outline the key provisions of the Franchise Agreement, and of the other franchise documents that are relied upon by the plaintiff.

(c) Contractual Provisions

(i) Advertising Contributions

19 Advertising is, of course, like oxygen for any fast food business, particularly a business based on takeout and delivery. The Panzerotto and Wing Machine System relied on centralized advertising by the Franchisor and required franchisees to contribute to an "advertising fund". The relevant contractual provisions were as follows:

> 7.07 The Franchisor will devise and administer an advertising program or programs, as set out in Article 10 hereof, as it in its discretion considers advisable.
>
> . . .
>
> 10.01 Except as otherwise provided herein, the Franchisor alone shall be responsible for all advertising including without limitation all telephone directory listings provided, however, that the Franchise Owner shall bear and be responsible for all charges for telephones or other communications equipment or terminations used by the Franchise Owner in connection with the Franchised Outlet.
>
> 10.02 The Franchise Owner shall not carry any form of advertising whatsoever without the written consent of the Franchisor.
>
> 10.03 (i), (ii), (iv) Co-Operative Program
>
> The Franchise Owner shall actively co-operate and participate in the advertising and sales promotion campaign instituted by the Franchisor and will:
>
>> (i) pay to the Franchisor, in addition to any other amounts payable pursuant to this agreement and when and as determined by the Franchisor, an amount not to exceed in any one year 5 percent of net sales. Such payments are to be made together with payments and at the time specified for the payments due for supplies and Products contemplated by this agreement by adding to payments due on account which is the advertising, promotion and merchandising cost payable pursuant to this paragraph. It is agreed that the Franchise Owner will be credited for advanced payments for such advertising, promotion and merchandising costs and the Franchisor and Franchise Owner shall reconcile their accounts on the anniversary date of this agreement in each year for the previous calendar year. Provided, however, notwithstanding the rate of advertising royalty, it is agreed that the contribution of the Franchise Owner to the advertising fund shall be no less than $175.00 per week to cover the various fixed advertising costs incurred by the Franchisor;
>>
>> (ii) deliver at its own expense, by direct mail, distribution company or other means approved by the Franchisor, at least six (6) times in each year during the term of this agreement, to each dwelling unit within the Territory, as may be designated by the Franchisor, on such dates as are set by the Franchisor, any advertising notice as supplied by the Franchisor;
>
> . . .
>
>> (iv) pay to the Franchisor for all advertising and promotional material and related costs supplied or paid for by the Franchisor and approved by the Franchise Owner, an amount equal to the cost to the Franchisor of such material, less any portion of such cost recovered by the Franchisor under subparagraph (i) of paragraph 10.03 hereof;

20 In addition, the Disclosure Document, provided by the Franchisor to the franchisees (Disclosure Document) pursuant to the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the *Wishart Act*), contained specific statements with respect to advertising:

> 4. In addition, article 10.03 of the Franchise Agreement requires the franchisee to pay a weekly advertising fund contribution from the date the franchisee opens for business. This weekly contribution is equal to 5% of delivery sales or $175.00 whichever is greater. Please refer to section 19 of this disclosure document for more information about the Franchisor's advertising fund.
>
> 5. The franchisee is also required to pay $.75 per delivery order toward local advertising, $.95 to the Franchisor for Call Centre Orders, and $35 per month to the Franchisor for store printer maintenance fees.
>
> . . .
>
> 14.2. The franchisee agrees to full and expediently participate in any and all advertising, sales, and promotional events and programs organized and/or conducted by the Franchisor including, without limitation, the distribution and redemption of coupons or similar promotional materials prescribed by the Franchisor for use in connection with the franchise.
>
> . . .
>
> 19.1 Pursuant to Articles 7.07 and 10.03 of the Franchise Agreement, the franchisee is required to pay weekly an advertising contribution equal to 5% of the Gross Sales of the Franchised Business. In any event, the contribution shall be no less than $175 per week to cover the various fixed advertising costs incurred by the Franchisor. The advertising contributions are to be paid weekly.
>
> 2. All payments by the Franchisee to the fund will be maintained in an account separate from any other monies of the Franchisor. The proceeds of the advertising fund will be used primarily for the development, production and implementation of advertising and promotional campaigns and programs in order to foster and promote goodwill and consumer recognition, loyalty to the System and to the Franchised Business, and to attract new franchisees to the System. The Franchisor will account each year as to advertising funds spent, including a reasonable allocation for the Franchisor's direct and indirect overhead expenses incurred in connection with the administration and management of the fund. It is understood and agreed that the Franchisor will allocate advertising funds, as it considers appropriate in its sole discretion.
>
> 3. For the current fiscal year ending April 30, 2004 the Franchisor projects that 100% of advertising fund contributions will be spent on national or local advertising campaigns. The Franchisor projects that 0% of advertising fund contributions will be retained.
>
> 4. For the fiscal year ending April 30, 2003 the Franchisor spent 100% of advertising fund contributions on national or local advertising campaigns. The Franchisor did not retain any of the advertising fund contributions.
>
> 5. For the fiscal year ending April 30, 2002 the Franchisor spent 100% of advertising fund contributions on national or local advertising campaigns. The Franchisor did not retain any of the advertising fund contributions.
>
> 6. The projected amount to be contributed by each franchisee depends solely on the individual franchisee's gross sales. Each franchisee is required to make weekly contributions equal to 5% of their previous week's gross sales to the advertising fund. In no event will the contribution be less than $175 per week.
>
> 7. Although the advertising fund is intended to be of perpetual duration, the Franchisor reserves the right to terminate the advertising fund, in its discretion. The fund will not be terminated, however, until all monies in the fund have been spent for advertising and/or promotional purposes.

> 8. The Franchisor may establish such policies and procedures for the administration of the advertising fund as the Franchisor, in its sole discretion, may consider necessary and appropriate. Reports on advertising activities financed by the fund will be made available to the franchisee on an annual basis.

21 The plaintiff's primary complaint under this head is that the Franchisor has extracted more money from the franchisees than it cost to operate the advertising and promotion campaign on behalf of the entire chain. The plaintiff claims that the Franchisor is required to account for the excess and pay it to the franchisees.

22 Although not put in exactly this form, the argument is that there is either an implied contractual term to this effect or that the Franchisor owed a fiduciary duty to franchisees to account for the excess.

23 The plaintiff also complains that the Disclosure Document misrepresented the extent to which the franchisees' contributions were used by the Franchisor.

(ii) Order Processing

24 The Franchise Agreement provides that franchisees are required to contribute to the costs of order processing. Basically, this involves the operation by the Franchisor of a centralized call centre at which takeout and delivery orders were received for the entire chain and were transmitted to franchisees according to their proximity to the order. Clause 5.04 provides:

> The Franchise Owner will pay at the time and in the matter provided in this Article, for each Franchisor's accounting period, such amount as may be determined by the Franchisor as being attributable to the Franchise Owner's share of the Order Processing Department costs for such period.

25 The plaintiff's complaint under this heading is similar to the complaint regarding the advertising contributions. It alleges that the franchisees' contributions exceeded the reasonable cost of operating the Order Processing Department during the class period.

(iii) Product Rebates

26 Section 8.01(iii) of the Franchise Agreement provides that the Franchisor may receive rebates and allowances from suppliers:

> ...The Franchisor may receive advertising allowances and other forms of rebates from its designated suppliers and may make a profit from the sale of Products to the Franchise Owner, without any obligation to disclose or account therefore to the Franchise Owner.

27 The Disclosure Document made reference to rebates and allowances. It stated that, although the Franchisor "currently" shared rebates with franchisees, it reserved the right to retain them in the future. Section 14, para. 1 provided:

> The Franchisor currently receives rebates, bonuses, discounts or other allowances, from soft drinks, poultry, frozen potato and meat suppliers. Although the Franchisor currently shares these rebates with its franchisees, the Franchisor and/or its affiliates reserve the right to retain these rebates in the future.

28 While there is no express contractual obligation on the Franchisor to share rebates, the plaintiffs allege that the statement that "the Franchisor currently shares these rebates with its franchisees" was an actionable misrepresentation under the *Wishart Act.*

(d) Disclosure by the Franchisor

29 The Franchisor has made extensive voluntary financial disclosure in an attempt to establish that it has not misappropriated any funds owing to the class. The Franchisor's accountant has met with the Franchisee's accountant

on several occasions. The Franchisor offered to permit the Franchisee and its accountant to review the complete books and records of the Franchisor, on a "with prejudice" basis, but this offer was allegedly declined.

30 It is not my responsibility, on this motion, to determine whether the disclosure has been complete or to determine what — if anything — has been proven by the disclosure. It does appear to me, however, that at least for the period since approximately 2002, the Franchisor has substantial records that will permit, I would expect, a relatively simple and expeditious determination of whether the Franchisor has complied with its contractual and statutory obligations.

31 I now turn to the test for certification and its application in this case.

II. The Test for Certification

32 Section 5(1) of the *C.P.A.* sets out the test for the certification of a class proceeding. The court *shall* certify the action as a class proceeding where the following conditions are met:

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

33 It is well-settled that the *C.P.A.* is remedial legislation and should be interpreted generously in order to give effect to its objectives: access to justice, behaviour modification and judicial economy: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.); *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 (Ont. Gen. Div.), at 47, aff'd (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.). These principles are not in dispute here.

34 I now propose to examine each of the s. 5 requirements.

(a) Section 5(1)(a): Cause of Action

35 Section 5(1)(a) of the *C.P.A.* requires that the pleadings disclose a cause of action. The test is the same as that applied in a motion to strike a pleading under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 on the ground that it discloses no reasonable cause of action: "assuming that the facts as stated in the Statement of Claim can be proved, is it 'plain and obvious' that the plaintiff's Statement of Claim discloses no reasonable case of action?" See *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.) at para. 33.

36 The causes of action asserted by the plaintiff include breach of contract, breach of fiduciary duty, and "constructive trust". There is a claim for breach of s. 3(2) of the *Wishart Act* and for "bad faith in relation to the excess contributions and product rebates". It is also alleged that the Disclosure Document contained misrepresentations with respect to the advertising contributions, contrary to the *Wishart Act* and regulation 581/00 under that statute, including the amount of money spent on advertising and a failure to deliver compliant financial statements as required by the statute.

37 It is alleged that the individual defendants are liable in their capacity as "franchisor associates" and are liable for the losses suffered by class members as damages as a result of misrepresentations in the disclosure document under s. 7(1)(a) and (d) of the statute.

38 The defendant has not disputed that the plaintiff meets the cause of action requirement. For that reason, my comments under this heading will be fairly brief.

(i) Breach of Contract

39 The pleading of breach of contract is vague and lacking in particularity. However, in applying the s. 5(1)(a) test, I am required to construe the pleading generously. I am satisfied that — with that test in mind — the plaintiff has adequately pleaded breach of contract with respect to the advertising contributions, the order processing contributions and the product rebates. What is less clear is whether the plaintiff has properly pleaded that the Franchisor has breached an implied term of the contract, as appears to have been argued in the submissions of plaintiff's counsel. It seems to me that it could be pleaded that it was an implied term of the franchise agreement that any advertising contributions or order processing contributions is excess of what was necessary for those purposes would be refunded to franchisees.

40 If this action is ultimately certified, and subject to any objections of the defendant, I would be prepared to entertain a motion to amend the statement of claim to plead breach of implied terms and a motion to amend the certification order to certify a common issue dealing with such implied terms.

(ii) Breach of Fiduciary Duty

41 The plaintiff pleads that the Franchisor owed a fiduciary duty to franchisees in connection with their contributions to the advertising fund. There is some doubt as to whether a franchisor owes a fiduciary duty to a franchisee. In *Fairview Donut Inc. v. TDL Group Corp.*, 2012 ONSC 1252 (Ont. S.C.J.) at para. 503, I suggested that there is no such duty:

> The duty of the franchisor to give consideration to the interests of the franchisee does not require the franchisor to prefer the franchisee's interests to its own, and the franchisor is not a fiduciary in that sense: *Shelanu* at paras. 5, 68-71. As Kershman J. observed in *117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.*, above, at paras. 68-72, a party may act self-interestedly, however in doing so that party must also have regard to the legitimate interests of the other party.

42 The decision of the Court of Appeal in *Shelanu Inc. v. Print Three Franchising Corp.*, [2003] O.J. No. 1919, 64 O.R. (3d) 533 (Ont. C.A.), at para. 70, supports the conclusion that while the franchisor owes the franchisee a duty of good faith and fair dealing at common law, this does not rise to the level of a fiduciary duty - at para. 70:

> The trial judge recognized that the relationship between a franchisor and a franchisee would not normally be characterized as a fiduciary one in accordance with *Jirna Ltd. v. Mister Donut of Canada Ltd.*, [1972] 1 O.R. 251, 22 D.L.R. (3d) 639 (C.A.), affd [1975] 1 S.C.R. 2, 40 D.L.R. (3d) 303. I do not agree that it logically follows from the trial judge's reference to partners that he applied the fiduciary standard in this case. At a later point in his reasons, the trial judge reiterated that a franchise relationship was akin to that of a partnership and, accordingly, like a partnership required mutual respect. He quoted from the decision of Kelly J. in *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (Sup. Ct.) at pp. 191-92, affd (1992), 112 N.S.R. (2d) 180, [1992] N.S.J. No. 175 (QL) (C.A.), to the effect that parties to a contract are required to exercise their rights under that agreement honestly, fairly, and in good faith, and that, when a party acts contrary to community standards of honesty and reasonableness or fairness, he acts in bad faith. The trial judge well knew the distinction between a duty of good faith and a fiduciary duty and did not hold Print Three to a fiduciary duty.

43 Notwithstanding these general statements, and in view of the low "plain and obvious" test applicable to the cause of action requirement, I am not prepared to find that the plaintiff's claim under this heading has no chance of success.

Indeed, while a franchisor may not generally be a fiduciary, it may be a fiduciary for specific purposes — for example, where it collects monies from franchisees for a specific purpose, it may have a fiduciary duty to use the money for that purpose, rather than for its own ends.

(iii) Constructive Trust

44 It the franchisor collects the franchisees' funds as a fiduciary, it is arguable that it holds the funds, and any accretion to the funds, on constructive trust.

(iv) Unjust Enrichment

45 The plaintiff's factum refers to unjust enrichment, but there is no pleading of unjust enrichment as such. There is no common issue that deals with unjust enrichment. If this action is ultimately certified, I would also consider a motion to amend the statement of claim to plead unjust enrichment and to amend the certification order to add a common issue concerning unjust enrichment.

(v) Breach of Duty of Good Faith and Fair Dealing

46 The plaintiff asserts a claim for the breach of the duty of good faith and fair dealing under s. 3 of the *Wishart Act*. Subsection 3(2) confers a statutory cause of action for breach of the duty. That section provides:

> (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> (2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.
>
> (3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

47 This cause of action has been properly pleaded and is appropriate for certification. The same cause of action has been certified in other franchise class actions.

(vi) Misrepresentation

48 One of the important purposes of the *Wishart Act* — perhaps the principal purpose — was to level the playing field between franchisors and franchisees by requiring pre-contractual disclosure by the franchisor, by giving a right of rescission in certain circumstances, and a cause of action for damages in the event of misrepresentations in the disclosure document.

49 A franchisor is required to provide a prospective franchisee with a disclosure document at least 14 days before the earlier of the signing of the franchise agreement and the payment of any consideration by the franchisee to the franchisor (s. 5(1)).

50 The disclosure document is required to contain: "all material facts", including the material facts prescribed by regulation; prescribed financial statements; copies of all proposed franchise agreements; and other information prescribed by regulation (s. 5(4)).

51 A franchisee who suffers loss as a result of a misrepresentation in a disclosure document is given a statutory right of action against the franchisor and the franchisor's associate (s. 7(1)). If the disclosure document contains a misrepresentation, a franchisee who acquired the franchise is deemed to have relied on the misrepresentation (s. 7(3)).

52 Ontario Regulation 581/00 made under the *Wishart Act* sets out in detail the required contents of the disclosure document. These include financial statements. Of particular significance to this proceeding are the following.

6.6. If the franchisee, as a condition of the franchise agreement, is required to contribute to an advertising fund,

i. a statement describing,

A. the percentage of the fund that has been spent on national campaigns and local advertising in the two fiscal years immediately preceding the date of the disclosure document, and

B. the percentage of the fund, other than the percentage described in sub-subparagraph A, that has been retained by the franchisor, the franchisor's parent or the franchisor's associate in the two fiscal years immediately preceding the date of the disclosure document,

ii. another statement describing,

A. the projected amount of the contribution,

B. a projection of the percentage of the fund to be spent on national or local advertising campaigns for the current fiscal year, and

C. a projection of the percentage of the fund to be retained by the franchisor, the franchisor's parent or the franchisor's associate in the current fiscal year, and

iii. an indication of whether reports on advertising activities financed by the fund will be made available to the franchisee.

. . .

8. A description of the franchisor's policy, if any, regarding volume rebates, and whether or not the franchisor or the franchisor's associate receives a rebate, commission, payment or other benefit as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly.

53 The plaintiff pleads that the disclosure document contained misrepresentations with respect to the use of the advertising fund and the sharing of product rebates. I am satisfied that the plaintiff has properly pleaded this cause of action.

(b) Section 5(1)(b): Identifiable Class

54 Section 5(1)(b) of the *C.P.A.* requires that "there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant."

55 The Franchisee seeks to have this action certified as a class proceeding on behalf of a class of present and former Panzerotto Pizza franchisees, Wing Machine franchisees and combined Panzerotto Pizza/Wing Machine franchisees, who were a party to a franchise agreement with the defendant at any time after January 31, 2001 up to the present, and did any one of the following: (a) paid advertising contributions to the Franchisor; (b) did not receive product rebates from the Franchisor; or (c) paid Order Processing Contributions to the Franchisor.

56 The start date of the class period is selected because that is when the *Wishart Act* came into effect.

57 The plaintiff acknowledged in submissions that the class period should end in July, 2011, when the Franchisor sold the assets of the franchise, including its interests in the franchise agreements, to Gino's Pizza. The plaintiff has conceded that it has no intention of attempting to certify this proceeding against Gino's Pizza, which acquired the Panzerotto and Wing Machine franchisees from the defendant in July 2011.

58 In my view, rather than defining the class by reference to what they paid or received, which will require a factual enquiry to determine membership in the class, and to that extent is merits-based, it makes more sense to define the class as all franchisees of the defendant who were parties to a franchise agreement with the defendant at any time between January 31, 2001 and July 1, 2011.

59 If the plaintiff is successful on the common issues, entitlement to compensation can be dealt with as an individual issue. Subject to this amendment, the proposed class definition is approved.

60 The class description is, of course, subject to any limitations defences that many be available to the defendants.

(c) Section 5(1)(c): Common Issues

61 The plaintiff's factum does not identify or discuss the proposed common issues, although they have been identified in the notice of motion for certification. I will discuss them in order:

(i) Excess Advertising Contributions:

62 The plaintiff proposes the following issues:

> Has 709 collected Excess Advertising Contributions from Class Members? If so:
>
> > (i) Does 709 owe Class Members a fiduciary duty in connection with the Advertising Program, operation of the Fund and use of the Fund money. If so, has 709 breached this duty? If so, have the Class Members suffered losses as a result, and in what amount?
> >
> > (ii) Have the defendants reinvested Excess Advertising Contributions? If so, are Class Members entitled to have any such reinvestment held in a constructive trust for the benefit of Class Members?
> >
> > (iii) Does the Disclosure Document contain the misrepresentations that are set out in paragraph 33 of the Statement of Claim in connection with Advertising Contributions? If so, have the Class Members suffered losses and in what amount? If so, are the defendants liable to Class Members for these losses under sections 7(1)(a) and (d) of the *Arthur Wishart Act (Franchise Disclosure), 2000?*

63 I am prepared to approve these common issues. As I have said earlier, while I have some doubt about whether a franchisor owes a general fiduciary duty to its franchisees, it is at least arguable that such a duty is owed where the franchisor administers a fund, to which the franchisees contribute, which is to be applied for a stated purpose.

(ii) Excess Order Processing Contributions:

64 The plaintiff proposes:

> Has 709 collected Excess Order Processing Contributions from Class Members? If so,
>
> > (i) Is 709 in breach of its obligations under the Franchise Agreement in so doing?
> >
> > (i) Have the defendants reinvested the Excess Order Processing Contributions? If so, are Class Members entitled to have any such reinvestment held in a constructive trust for the benefit of Class Members?
> >
> > (ii) Is 709 liable to the Class Members for misrepresentation in connection with the collection of Excess Order Processing Contributions? If so, have the Class Members suffered losses and in what amount? If so, are the defendants liable to Class Members liable to Class Members for these losses under sections 7(1)(a) and (d) of the [*Wishart*] *Act?*

65 Subject to further amendment of these common issues, in the event that the plaintiff amends the statement of claim to plead an implied contractual term, I will approve these common issues.

(iii) Product Rebates:

66 The proposed common issue is as follows:

> Is the statement in the Disclosure Document that 709 "currently shares" the product rebates with its franchisees a misrepresentation? If so, have the Class Members suffered losses and in what amount? If so, are the defendant liable to Class Members for these losses under sections 7(1)(a) and (d) of the [*Wishart*] *Act?*

67 The claim with respect to rebates is based solely on the alleged misrepresentation in the disclosure document. There is no contractual entitlement to product rebates. It appears that the same form of disclosure document was provided to all franchisees. I will approve this common issue.

(iv) Bad Faith:

68 The common issue is:

> Has 709 misappropriated the Excess Advertising Contributions, failed to share the Product Rebates with Class Members and Misappropriated the Excess Order Process[ing] Contributions in breach of its duty of fair dealing in the performance and enforcement of its obligations under the Franchise Agreement as required under section 3(1) of the [*Wishart*] *Act*? If so, are the defendants liable to Class Members under subsection 3(2) of the [*Wishart*] *Act* for the above damages with respect to the Excess Advertsing Contributions, Class Members' share of the Product Rebates and the Excess Order Processing Contributions?

69 I have set out above the provisions of s. 3 of the *Wishart Act.* The description of this common issue as "bad faith" is a misnomer, because it is too narrow. The duty of good faith and fair dealing may include a duty not to act in bad faith, but it is broader. It is a duty of fair dealing in the performance and enforcement of the franchise agreement and this includes a duty to act in good faith and in accordance with reasonable commercial standards.

70 Similar common issues were approved in: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287, [2011] O.J. No. 1618 (Ont. S.C.J.); *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 4571, [2010] O.J. No. 3921 (Ont. S.C.J.) and *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889 (Ont. S.C.J.). The question focused exclusively on the conduct of the defendant.

71 I would simplify the proposed common issue as follows:

> If it is found that the defendant engaged in any of the conduct described in common issues (a), (b) and (c), was such conduct a breach of the defendant's duties under s. 3 of the *Arthur Wishart Act?*

72 If the common issues judge finds that there was a breach of the s. 3 duties, he or she can give further directions concerning the quantification of damages.

(v) Punitive damages

73 This proposed common issue is as follows:

> Are the defendants liable to Class Members for Punitive Damages? If so, in what amount?

74 The plaintiff's factum contained no discussion of the extensive case law concerning the question of whether it is appropriate to certify punitive damages as a common issue: see *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, [2012] O.J. No. 168 (Ont. S.C.J.) at paras. 369 to 378 for a discussion of some of the leading authorities.

75 In this case, I am prepared to adopt a similar approach to that followed in *Cannon* and in *Schick v. Boehringer Ingelheim (Canada) Ltd.*, [2011] O.J. No. 1381, 2011 ONSC 1942 (Ont. S.C.J.) and to certify the following common issue:

Does the conduct of the defendant justify an award of punitive damages?

76 If the answer is in the affirmative, the common issues judge can give further directions concerning the quantification of punitive damages, which may require individual assessments.

(vi) Additional Common Issue: Franchisor's Associate

77 The plaintiff pleads that the individual defendants are "franchisor's associates" under the *Wishart Act*, and pleads that they are liable for misrepresentations in the disclosure document pursuant to s. 7(1)(a) and (d) of the *Wishart Act.*

78 Section 1(1) of the *Wishart Act* defines a "franchisor's associate" as follows:

"franchisor's associate" means a person,

(a) who, directly or indirectly,

(i) controls or is controlled by the franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

(i) is directly involved in the grant of the franchise,

(A) by being involved in reviewing or approving the grant of the franchise, or

(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or

(ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise ...

79 The issue is relevant to the claim for misrepresentation under s. 7 of the *Wishart Act*, which confers a right of action against a franchisor's associate as a result of a misrepresentation in a disclosure document.

80 There is a basis in fact for the existence of a common issue asking whether the individual defendants were "franchisor's associates" within the meaning of the statute. It seems to me that it would be beneficial to both parties to have this included as a common issue. Subject to any further submissions the parties wish to make on the issue, I would be prepared to approve it.

81 I must say that it is difficult to see any basis on which Alexander Schiavone could be found to be a franchisor's associate and the plaintiff may wish to consider discontinuing against him.

(d) Section 5(1)(d): Preferable Procedure

82 A class proceeding will frequently be the preferable procedure for the resolution of a franchise dispute: see *Fairview Donut Inc. v. TDL Group Corp.*, above, and the cases referred to therein at para. 351. As was noted there, "[T]he existence of a clearly identifiable class, a common standard form contract and a common business system, coupled with conduct of the franchisor that treats every franchisee in the same way, frequently makes it possible to identify common issues of fact and law that are suitable for class-wide resolution."

83 In this case as well, the plaintiffs note that class members are, for the most part, unsophisticated and have minimal knowledge of English. They may well be reluctant to initiate litigation against the Franchisor without the anonymity and strength in numbers offered by a class proceeding. The cost of pursuing litigation, including the cost of expert accounting evidence, in comparison to the fairly modest amount at issue for each franchisee, would make an individual action prohibitively expensive.

84 The defendant has not strenuously contested the preferability requirement. The relatively small size of the class, the limited scope of the common issues and the availability of the franchisor's financial information suggest that the trial of the common issues could be relatively simple. No more preferable procedure has been identified. I am satisfied that this requirement has been met.

(e) Section 5(1)(e): Representative Plaintiff

85 Section 5(1)(e) of the *C.P.A.* requires that:

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

86 The defendant points to a number of circumstances that call into question the Franchisee's suitability as a representative of the class and raise concerns about its motivations in commencing this action.

87 In my view, the evidence raises grave concerns about the competence and suitability of the proposed representative plaintiff. It suggests that the plaintiff, who complains about the Franchisor's good faith and fair dealing, did not itself display the reciprocal obligation of good faith and fair dealing. It alleges that the Franchisor committed breaches of contract, yet the evidence supports the conclusion that it was guilty of egregious breaches of contract. The plaintiff alleges non-disclosure, yet appears itself to have been guilty of non-disclosure.

88 The following is a summary of some of the more significant evidence:

• the Franchisee's cheques to the Franchisor, for payments due under the Franchise Agreement, "bounced" on numerous occasions;

• the Franchisee fell seriously in arrears on its remittances due to the Franchisor;

• the Franchisee breached other provisions of the Franchise Agreement, including its duty to provide financial statements to the Franchisor;

• the Franchisee failed to file any income tax returns for its business (and for another, competing business);

• the Franchisee failed to pay PST and GST to the government, even though it had collected these taxes at source from its customers, resulting in a $25,000 lien by the Ministry of Revenue;

• within a few months of signing the Franchise Agreement, the Franchisee secretly entered into an agreement to operate a "Double Double" pizza franchise and continued to operate that business throughout the term of the Franchise Agreement, in breach of a provision that required each officer of the Franchisee to devote his or her full

time and attention to the franchise business and arguably in breach of a non-competition covenant in the Franchise Agreement;

• there is evidence that the franchisee may have breached other provisions of the Franchise Agreement, by failing to properly report sales and by using unapproved, low cost ingredients;

• there are genuine issues raised concerning the credibility of the Franchisee's officers;

• the Franchisee simply abandoned its store, without notice to the Franchisor, in April 2008;

• the Franchisee is essentially insolvent. It owes at least $25,000 in PST and GST; it owes unpaid income tax and about $30,000 to the Franchisor; it is no longer in business and the company has been dissolved.

89 On October 4, 2007, by which time the Franchisee owed $10,000 under the Franchise Agreement and nearly $20,000 under a promissory note, the Franchisor sent a notice of default and a demand for payment to the Franchisee.

90 The plaintiff's counsel responded by letter with a demand for information under the *Wishart Act* and Regulation 581/00 with respect to reports on advertising activities financed by the advertising fund. There was no response at all to the demand for payment.

91 With some justification, the Franchisor treated the letter as a tactic to avoid compliance with the Franchisee's contractual obligations. It replied on October 18, 2007, stating that it did not provide reports on its advertising activities to its franchisees.

92 Some further paper missiles were exchanged. Ultimately, On April 21, 2008, the Franchisor sent the Franchisee a second notice of default and demand for payment.

93 Two days later, without notice to the Franchisor, the Franchisee abandoned the business premises and simply stopped carrying on business. It allegedly removed some fixed assets from the premises and left behind a debt of over $30,000.

94 The Franchisor has brought a counterclaim against the Franchisee for $32,000.

95 If the Franchisee was hoping to use this action to fend off the Franchisor, it appears to have worked. Four years later, the Franchisee appears to be insolvent and the chances of collection on the counterclaim seem remote.

96 The Franchisor questions the motivation of the Franchisee in commencing this action. It says that the plaintiff has abused the purpose of the *C.P.A.* and describes this action as a "shakedown". It says that this action is so "tainted" and "infused" with the plaintiff's improper motive that certification should be refused and leave should not be given to substitute another plaintiff.

97 In my view, the defendant's concerns about the suitability of the representative plaintiff have merit. He is not a suitable representative of the class. However, in spite of the very able and strenuous submissions of Mr. Slodovnick, this is not the kind of exceptional case in which I should refuse altogether to consider a suitable replacement. Having found that there is a factual basis for the common issues — and without in any way prejudging liability, which remains a very contentious issue — it would be unfair to the proposed class to dismiss this motion outright without giving another representative the opportunity to come forward.

98 I will briefly elaborate on my reasons.

99 The evidence certainly supports the conclusion that the plaintiff's sole motivation in commencing this action was to deflect the Franchisor's claims under the Franchise Agreement. The issue of the advertising fund — or for that matter any of the claims of this action — had never been raised by the plaintiff or any other franchisee. The plaintiff has ceased

to operate as a Panzerotto franchisee. It has nothing to gain by this action. Any potential recovery will go to its creditors. The action appears to have been commenced on the theory that "the best defence is a strong offence".

100 There are, as I have noted, more troubling aspects of the plaintiff's conduct that call into question its good faith and fair dealing, its business ethics, its competence and the honesty and credibility of its principals. These in turn make them profoundly unsuitable to represent the class. Moreover, in view of the substantial and apparently meritorious counterclaim against the plaintiff, its interests may well be in conflict with the class. It may have little motivation to seriously pursue the action.

101 I am not, however, prepared to dismiss the motion altogether. Having found the action otherwise suitable for certification, it would be a waste of time, money and judicial resources to require that the class start afresh, if indeed there is a will amongst franchisees to pursue the matter. As I have noted earlier, this action is well advanced in terms of disclosure by the defendant. If a suitable representative comes forward, and if the class remains reasonably intact after the opt-out period, it should be possible to move to discovery and a relatively short common issues trial on an expedited basis.

102 This approach is supported by the authorities. In *Martin v. AstraZeneca Pharmaceuticals PLC*, [2009] O.J. No. 3847 (Ont. S.C.J.), Cullity J. observed, at para. 20, that our courts have not generally been receptive to arguments that the action has to go back to square one if the putative plaintiff is found wanting:

> Even if defendants' counsel were correct in their submission that other persons could not then be substituted as plaintiffs, there would be nothing to prevent the commencement of a new and otherwise identical action by such persons. As one of the fundamental features of proceedings under the CPA is the existence of a class of similarly situated claimants, the likelihood that a substitute plaintiff would be available cannot, in my opinion, be dismissed as fanciful or unduly speculative. In view of the important responsibilities of representative plaintiffs, it has become quite common for changes to be made — and sometimes more than once - in those proposed to act as such as the proceeding moves towards certification. The court has, moreover, not generally been receptive to submissions that the removal or withdrawal of plaintiffs requires a new action to be commenced rather than a substitution of new plaintiffs: see *Segnitz; Matoni v. CBS Interactive Multimedia Inc.*, [2008] O.J. 197 (S.C.J.); *Veley; Heron v. Guidant Corporation*, [2007] O.J. No. 3823 (S.C.J.); and *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.).

103 Accordingly, the motion is adjourned to permit a motion to substitute a new representative plaintiff.

III. Pending Motions

104 There is a pending motion by the defendant for security for costs and a pending motion by the plaintiff for disclosure of financial information. Both motions will be adjourned.

105 Without deciding the issue, it seems to me that the disclosure motion is best dealt with in the context of discovery, if and when the action is certified. If the action is certified, a case conference could be held to discuss the schedule going forward, including production and discovery.

106 I will hear the security for costs motion at the same time as any motion to substitute a representative plaintiff.

IV. Conclusion

107 The certification motion is adjourned, with leave to bring a motion to substitute a new representative plaintiff. Such motion shall be brought within 90 days, failing which the motion for certification will be dismissed. If the motion is brought, it shall be heard contemporaneously with the defendants' motion for security for costs.

108 If a motion is brought to substitute a new plaintiff, the proposed representative plaintiff (or an officer of any corporate plaintiff) should be prepared to personally attend the continuation of the motion so that the court can assure

1291079 ONTARIO INC.
Plaintiff

and

SEARS CANADA INC. ET AL.
Defendant

Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE DEFENDANTS WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, JAMES MCBURNEY and DOUGLAS CAMPBELL
(MOTION FOR CERTIFICATION)

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza, 40 King Street West
Toronto, ON M5H 3C2
Fax: 416.640.3108

William J. Burden LSO #: 15550F
Tel: 416.869.5963
Fax: 416.640.3019
bburden@casselsbrock.com

Wendy Berman LSO #: 32748J
Tel: 416.860.2926
Fax: 416.640.3107
wberman@casselsbrock.com

John N. Birch LSO #: 38968U
Tel: 416.860.5225
Fax: 416.640.3057
jbirch@casselsbrock.com

Lawyers for the Defendants William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, James McBurney and Douglas Campbell

itself that he or she has the necessary independence and knowledge of the responsibilities — and potential liabilities — of taking on the role of representative of the class.

109 The costs of this motion should be deferred to await the outcome of any motion to substitute a new representative plaintiff. If the action is permitted to continue, this may be a case in which the costs of certification should be in the cause.